

## GONE WITH THE WIND? VMI'S LOSS AND THE FUTURE OF SINGLE-SEX PUBLIC EDUCATION

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*"By One Vote, VMI Decides to Go Coed; Nation's Last All-Male Military School to Enroll Women Starting in '97."*<sup>1</sup>

*"In East Harlem, a School Without Boys; Experiment with All-Girl Classes Taps New Mood in Public Education."*<sup>2</sup>

### I. INTRODUCTION

On September 22, 1996, the *Washington Post* carried these two headlines, displayed side by side on the front page of its Sunday edition. The first story was not unexpected. It was the all-but-inevitable<sup>3</sup> consequence of the June 26, 1996 decision by the United States Supreme Court in *United States v. Virginia*,<sup>4</sup> a decision declaring unconstitutional state supported, single-sex education at the Virginia Military Institute (VMI). The second story was even more routine, hardly the stuff for front page news. Similar stories have frequently appeared in newspapers across the

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1. Donald P. Baker, *By One Vote, VMI Decides to Go Coed; Nation's Last All-Male Military School to Enroll Women Starting in '97*, WASH. POST, Sept. 22, 1996, at A1.

2. Rene Sanchez, *In East Harlem, a School Without Boys; Experiment With All-Girl Classes Taps New Mood in Public Education*, WASH. POST, Sept. 22, 1996, at A1.

3. Under the Supreme Court decision, the admission of women was not expressly mandated, leaving many observers to believe that Virginia still had the other option identified by the Fourth Circuit when it said, in 1992, that the Commonwealth could "abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution." *United States v. Virginia*, 976 F.2d 890, 900 (4th Cir. 1992), *on remand*, 852 F. Supp. 471 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *rev'd*, 116 S. Ct. 2264 (1996) [hereinafter *VMI III*]. The same option was identified by the Fourth Circuit judges who dissented from the opinion of the court in the second appeal of the case. See *United States v. Virginia*, 44 F.3d 1229, 1243 (4th Cir. 1995) (Phillips, J., dissenting), *rev'd*, 116 S. Ct. 2264 (1996) [hereinafter *VMI IV*]; *United States v. Virginia*, 52 F.3d 90, 93 (4th Cir. 1995) (Mott, J., dissenting from denial of rehearing en banc review).

While attorneys for the Department of Justice (DOJ) insisted that VMI was required to co-educate, the federal position was undercut when, on September 19, 1996, the Fourth Circuit remanded the case to the district court with a per curiam opinion suggesting that privatization was still an option. Remand Order, 96 F.3d 114, 114 (4th Cir. 1996). Notwithstanding the arrival of the Remand Order two days before the Board of Visitors meeting, the Board concluded by a one-vote margin that the practical obstacles to privatization left VMI with no choice but to end its 157-year all-male tradition and admit women. See Mike Allen, *Defiant V.M.I. to Admit Women, but Will Not Ease Rules for Them*, N.Y. TIMES, Sept. 22, 1996, at A1.

4. 116 S. Ct. 2264 (1996) [hereinafter *VMI V*].

country during recent years.<sup>5</sup> Yet the juxtaposition of these two headlines was both unusual and ironic. Together, they raise questions about whether the Court reads from the same Constitution as Americans living beyond the Beltway,<sup>6</sup> and whether the budding revival of publicly supported, single-sex education can survive the loss by VMI. The first question, while undoubtedly the more important, is a political issue and beyond the scope of this article.<sup>7</sup> The focus here is on the second question, the legal implications of the VMI decision for the future of single-sex public education.

## II. HISTORY OF THE VMI CASE

The Virginia Military Institute is no ordinary college. Even among military colleges, it is an extraordinary place. Founded in 1839, the Institute won fame during the War Between the States when its Corps of Cadets marched into combat at the Battle of New Market and helped repel an invading Union army.<sup>8</sup> More important, though, than VMI's battle streamer is its commitment to producing "citizen-soldiers"<sup>9</sup> through the use of what is termed the "adversative method."

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5. See, e.g., Mike Bowler, *All-Male, All-Black, All Learning*, BALT. SUN, Oct. 15, 1995, at 2C; Susan Estrich, *For Girls' Schools and Women's Colleges, Separate is Better*, N.Y. TIMES, May 22, 1994, § 6 (Magazine), at 39; *Letting Boys Be Boys*, WASH. POST, July 8, 1995, at A17.

6. For those unfamiliar with the term, "The Beltway" is the name commonly used for the circumferential interstate highway surrounding Washington, D.C. and those bordering segments of Maryland and Virginia where many government agencies and government related firms are located. The term has come to be used pejoratively, encapsulating the radical difference in opinions and attitudes often held by the government and the governed. See generally *National Broiler Council v. Voss*, 44 F.3d 740, 749 (9th Cir. 1994) (O'Scannlain, J., specially concurring) ("Let us hope that Alice's world can be confined to the Wonderland within the Washington Beltway.").

7. The political criticism was made with stinging insight by Justice Scalia, who suggested that the Court decided the VMI case not just incorrectly, but illegitimately:

[T]he tradition of having government-funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat. The people may decide to change the one tradition, like the other, through democratic processes; but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law . . . . This is not the interpretation of a Constitution, but the creation of one.

*VMI V*, 116 S. Ct. at 2293 (Scalia, J., dissenting); see also William G. Broaddus, *Is the VMI Decision an Omen or an Aberration?*, CHRON. HIGHER EDUC. (Washington, D.C.), July 12, 1996, at A48. ("[I]t is a lamentable example of the judiciary's usurping the right of educators and publicly elected officials to make educational [sic] decisions.").

8. The ten cadets slain in this battle are still remembered by name each year on May 15th, the anniversary of the Institute's victory. See *VMI CATALOGUE* 5 (1996-97).

9. Stated more precisely,

It is the mission of the Virginia Military Institute to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril.

*United States v. Virginia*, 766 F. Supp. 1407, 1425 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *on remand*, 852 F. Supp. 471 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *rev'd*, 116 S. Ct. 2264 (1996) [hereinafter *VMI I*] (quoting *Mission Study Committee of the VMI Board of Visitors, Report* (May 16, 1986)).

Once used but now abandoned at the national service academies,<sup>10</sup> the adversative method deliberately induces stress for the purpose of “creating doubt about previous beliefs and experiences in order to create a mindset conducive to the values VMI attempts to impart.”<sup>11</sup> Entering students at VMI are called “rats” and are subjected to an extreme form of the adversative method known as the “rat line” that is “comparable to Marine Corps boot camp in terms of both the physical rigor and mental stress of the experience.”<sup>12</sup> Other components of VMI’s adversative system include: the class system,<sup>13</sup> the “dyke” system,<sup>14</sup> the honor code,<sup>15</sup> the barracks,<sup>16</sup> the military system,<sup>17</sup> and the academic educational system.<sup>18</sup>

“VMI has notably succeeded in its mission to produce leaders; among its alumni are military generals, Members of Congress, and business executives.”<sup>19</sup> General of the Army George C. Marshall was a graduate of VMI, as were six recipients of the Congressional Medal of Honor.<sup>20</sup> VMI’s “success and reputation are uncontroverted” and it is “that very success in producing leaders that has made admission to VMI desirable to some women.”<sup>21</sup>

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10. While more rigorous than the national service academies, VMI’s program is “directed at preparation for both military and civilian life” and “[o]nly about 15% of VMI cadets enter career military service.” *Id.* at 1432. VMI enrolls about 1300 students. *See id.*

11. *Id.* at 1421.

12. *Id.* at 1422.

13. Each class of students has specific responsibilities and privileges, with the first class (at other schools the “seniors”) being responsible for providing overall leadership. *See id.* at 1422-23.

14. Each rat is assigned a first classman who serves as his “dyke” or mentor. The name derives from the white cross-belts, or dykes, which are worn as part of the dress uniform and which the rat must assist his dyke in donning. *See id.* at 1423.

15. “[A] cadet ‘does not lie, cheat, steal nor tolerate those who do.’” *Id.* The single sanction for violating this code is expulsion. *See id.*

16. VMI has no dormitories, as such, and does not permit cadets to live off campus. *See id.* All cadets live in the barracks, which contain spartan living quarters opening onto four levels of open-air stoops, which are arranged around two connecting courtyards. *See id.* The barracks are an essential element of the adversative method. *See id.* “Producing a VMI graduate without the barracks experience would be equivalent to dressing someone up in the uniform of a Marine without first sending them to boot camp.” *Id.*

17. Although each cadet must participate in one of four Reserve Officers’ Training Corps (ROTC) programs for all four years at VMI, the VMI military system is not directly connected to the ROTC program. “The military regulations confine the choices and developmental tasks confronted by students to those considered essential to the achievement of VMI’s mission.” *Id.* at 1424.

18. “The academic program (aside from physical education) at VMI is not unique. VMI offers undergraduate courses leading to Bachelor of Arts and Bachelor of Science degrees, in liberal arts, science, and engineering disciplines.” *Id.*

19. *VMI V*, 116 S. Ct. at 2269.

20. *See VMI II*, 976 F.2d at 892-93.

21. *Id.* at 893.

The legal assault on VMI began in 1990<sup>22</sup> when the United States Attorney General, Richard L. Thornburgh, authorized the federal Department of Justice (DOJ) to initiate an action challenging the Institute's all-male status under the Equal Protection Clause of the Fourteenth Amendment.<sup>23</sup> Suit was brought against VMI in the United States District Court for the Western District of Virginia, Roanoke Division, and the case was assigned to the Honorable Jackson L. Kiser. According to the DOJ, it was prompted to file suit because of a letter written by a young woman who planned a career in the military and wanted to attend VMI but could not do so because of her sex.<sup>24</sup> Unlike the coeducation case brought in South Carolina against The Citadel<sup>25</sup> by the now famous Shannon Faulkner, the case against VMI was not brought pursuant to the more commonly used civil rights statute, 42 U.S.C. § 1983, nor did it ever involve a named individual as a plaintiff.<sup>26</sup> Instead, the case was brought pursuant to 42 U.S.C. § 2000c-6, which gives the Attorney General standing to bring actions in certain cases alleging discrimination against persons wanting to attend a public college.<sup>27</sup>

22. This case brought against VMI by the federal government was not the first time that the single-sex status of the Institute had been challenged. Nearly a generation earlier, as part of the class-action litigation leading to the coeducation of the University of Virginia, a three-judge panel rejected the plaintiffs' plea for an order requiring the coeducation of all Virginia colleges. The court held that the exclusion of women from the University of Virginia was a violation of the Equal Protection Clause, but then said:

We are urged to go further and to hold that Virginia may not operate any educational institution separated according to the sexes. We decline to do so . . . . One of Virginia's educational institutions is military in character. Are women to be admitted on an equal basis, and, if so, are they to wear uniforms and be taught to bear arms?

*Kirstein v. Rector & Visitors*, 309 F. Supp. 184, 187 (E.D. Va. 1970) (three-judge panel). The question asked rhetorically by the court in *Kirstein* has now been answered in the affirmative by the Supreme Court in *VMI*.

23. The original named defendants to the suit were the Commonwealth of Virginia; Governor Lawrence Douglas Wilder (later, Governor George F. Allen); VMI, its superintendent, president, and members of its Board of Visitors; and Virginia's State Council of Higher Education and its members. Two private organizations, the VMI Foundation and the VMI Alumni Association, were granted leave to intervene as defendants. For simplicity, the defendants will be collectively referred to as VMI.

24. See *Justice Department Files Sexual Bias Suit Against VMI*, U.S. NEWSWIRE, Mar. 1, 1990, at 1.

25. *Faulkner v. Jones*, 858 F. Supp. 552 (D.S.C. 1994), *aff'd in part, modified in part*, 51 F.3d 440 (4th Cir.), *cert. denied*, 116 S. Ct. 352 (1995).

26. While the DOJ did not identify the young woman who wrote the letter, she came to be known in the litigation by the euphonious pseudonym Jackie Jones. Four years later, it was reported that the mysterious Ms. Jones was then attending the Virginia Polytechnic Institute and State University (Virginia Tech), where she had declined to enroll in ROTC, having changed her mind about wanting a career in the military. Steven Foster, *The Real "Jackie Jones" Changed Mind, Not Beliefs*, ROANOKE TIMES & WORLD NEWS, Feb. 12, 1994, at C1.

27. § 2000c-6 (a) and (b) read in relevant part:

(a) Whenever the Attorney General receives a complaint in writing—

(2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, sex or national origin,

and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney

Following a six-day trial in April of 1991, the district court ruled in favor of VMI.<sup>28</sup> In reaching this result, the court applied the intermediate scrutiny test<sup>29</sup> used by the Supreme Court in *Mississippi Univ. for Women v. Hogan*,<sup>30</sup> but found a substantial factual distinction between the two cases in the significance of the single-sex setting. The district court noted that, in *Hogan*, the Supreme Court found:

[T]he uncontroverted record reveals that admitting men to nursing classes does not affect teaching style, . . . that the presence of men in the classroom would not affect the performance of the female nursing students, . . . and that men in coeducational nursing schools do not dominate the classroom . . . . In sum, the record in this case is flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of MUW's educational goals.<sup>31</sup>

In other words, the *Hogan* decision was based largely on what the Supreme Court viewed as the irrelevance of the single-sex setting to objectives claimed by the government as important.<sup>32</sup> The district court found the record in *VMI* to be "directly to the contrary" of *Hogan*:

The [VMI] record is replete with testimony that single gender education at the undergraduate level is beneficial to both males and females. Moreover, the evidence establishes that key elements of the adversative VMI educational system, with its focus on barracks life, would be fundamentally altered, and the distinc-

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General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against parties and for such relief as may be appropriate . . . .

(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation . . . .

28. See *VMI I*, 766 F. Supp. at 1408.

29. Under the Fourteenth Amendment, there are three levels of constitutional scrutiny authorized by the Supreme Court: rational basis scrutiny, intermediate scrutiny, and strict scrutiny:

These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to [the Supreme Court] which test will be applied in each case. Strict scrutiny . . . is reserved for state classifications based on race or national origin and classifications affecting fundamental rights . . . . [The Supreme Court has] no established criterion for intermediate scrutiny either, but essentially [applies] it when it seems like a good idea to load the dice. So far it has been applied to content-neutral restrictions that place an incidental burden on speech, to disabilities attendant to illegitimacy, and to discrimination on the basis of sex.

*VMI V*, 116 S. Ct. at 2292 (Scalia, J., dissenting) (internal quotations and citations omitted). "Conversely, classifications based on social or economic factors receive the lowest level of Fourteenth Amendment scrutiny. They are presumed valid and pass constitutional muster if they are rationally related to a legitimate state interest." *Faulkner*, 858 F. Supp. at 562 (citations omitted).

30. 458 U.S. 718 (1982). *Hogan* involved a lawsuit successfully brought by a male plaintiff seeking admission to the nursing program at the Mississippi University for Women.

31. *VMI I*, 766 F. Supp. at 1411 (quoting *Hogan*, 458 U.S. at 731).

32. While not mentioned by the district court in *VMI*, the Supreme Court in *Hogan* also noted that the nursing program at issue was not truly single-sex, since men were allowed to audit the courses and to participate in them fully, although they could not earn academic credit or a degree. See *Hogan*, 458 U.S. at 721 n.4, 731.

tive ends of the system would be thwarted, if VMI were forced to admit females and to make changes necessary to accommodate their needs and interests.<sup>33</sup>

Thus, the district court concluded:

I find that both VMI's single-sex status and its distinctive educational method represent legitimate contributions to diversity in the Virginia higher education system, and that excluding women is substantially related to this mission. The single-sex status would be lost, and some aspects of the distinctive method would be altered if it were to admit women. VMI has, therefore, met its burden under *Hogan* of showing a substantial relationship between the single-sex admission policy and achievement of the Commonwealth's objective of educational diversity.<sup>34</sup>

In an aside, the district court noted that Virginia's failure to provide a state supported single-sex institution for women might be problematic, but that this issue was not raised in the litigation:

[I]t seems to me that the criticism which might be directed toward Virginia's higher educational policy is not that it maintains VMI as an all-male institution, but rather that it fails to maintain at least one all-female institution. But this issue is not before the Court.

The relief that the United States seeks in this suit is to require VMI to open its doors to women — not to force Virginia to establish an all-female, state supported college.

. . . [W]hether Virginia can continue to rely upon private colleges to supply single-gender education to females or whether it must operate a state supported, all-female college is not an issue to be resolved in this lawsuit.<sup>35</sup>

With the district court having thus addressed only the issue raised by the plaintiff, VMI successfully repelled efforts by the DOJ to force coeducation upon it.<sup>36</sup> The case then went to the Fourth Circuit on appeal.

In an unanimous decision, the Fourth Circuit affirmed the factual findings and basic legal conclusions of the district court but ultimately reversed the district court on the issue of liability.<sup>37</sup> The Fourth Circuit agreed that there was a constitutionally sufficient reason for VMI to limit its program to men: "[T]he record supports the conclusion that single-sex education is pedagogically justifiable, and VMI's system, which the district court found to include a holistic formula of training, even more so."<sup>38</sup> The Fourth Circuit then broke away from the approach followed by the district court and turned to what it called "the larger question of whether the unique benefit offered by VMI's type of education can be denied to

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33. *VMI I*, 766 F. Supp. at 1411.

34. *Id.* at 1413.

35. *Id.* at 1414-15.

36. *See id.* at 1415.

37. *See VMI II*, 976 F.2d at 892. The three-judge panel hearing the case included Circuit Judge Paul V. Niemeyer, Senior Circuit Judge J. Dickson Phillips, and Senior District Judge Hiram H. Ward.

38. *Id.* at 898.

women by the state.”<sup>39</sup> Notwithstanding the limited issues raised by the plaintiff, the Fourth Circuit declared:

The decisive question in this case therefore transforms to one of why the Commonwealth of Virginia offers the opportunity only to men. While VMI’s institutional mission justifies a single-sex program, the Commonwealth of Virginia has not revealed a policy that explains why it offers the unique benefit of VMI’s type of education and training to men and not to women.<sup>40</sup>

In reviewing the record, the Fourth Circuit did not find a satisfactory answer to its question, stating that, other than the rigor of VMI’s physical program, which could be adjusted for women in their own single-sex institution, “[n]o other aspect of the program has been shown to depend upon maleness rather than single-genderedness.”<sup>41</sup> Thus, the issue that the district court had observed was not in the case was seized upon by the court of appeals and made the linchpin of its 1992 decision finding a violation of the Equal Protection Clause.<sup>42</sup> Wounded by this unexpected blow, VMI was forced back to the district court under a finding of liability,<sup>43</sup> but with a remand order that allowed several options: “[T]he Commonwealth might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution.”<sup>44</sup>

In February of 1994, VMI was back before the district court for a trial on the adequacy of the remedy it had chosen.<sup>45</sup> Having focused on the Fourth Circuit’s remand language allowing for “creative options,”<sup>46</sup> the Commonwealth had created the Virginia Women’s Institute for Leadership (VWIL), an all-female leadership program with a military component, including Reserve Officers’ Training Corps (ROTC), at nearby Mary Baldwin College.<sup>47</sup>

39. *Id.*

40. *Id.*

41. *Id.*

42. The issue defined by the Fourth Circuit was a refinement of the question identified by the district court but held not to be in the litigation. Although the district court had suggested a potential problem from the fact that Virginia failed to maintain “at least one all-female institution,” the Fourth Circuit focused more narrowly on Virginia’s failure to maintain a particular type of all-female institution, i.e., one that offers “the unique benefits of VMI’s type of education and training.” *VMI I*, 766 F. Supp. at 1414; *VMI II*, 976 F.2d at 898.

43. See *VMI II*, 976 F.2d at 900.

44. *Id.* at 900.

45. See *United States v. Virginia*, 852 F. Supp. 471, 476 (W.D. Va. 1994), *aff’d*, 44 F.3d 1229 (4th Cir. 1995), *rev’d*, 116 S. Ct. 2264 (1996) [hereinafter *VMI III*]. In the meantime, VMI’s Petition for Rehearing and Suggestion for Rehearing En Banc had been denied by the Fourth Circuit. *United States v. Virginia*, 52 F.3d 90 (4th Cir. 1995). Also denied was VMI’s Writ of Petition for Certiorari. See 113 S. Ct. 2431 (1993). Justice Scalia joined in the denial, based on the principle “we generally await final judgment in the lower courts before exercising our certiorari jurisdiction.” *Id.* at 2432. VMI was not precluded, however, from “raising the same issues in a later petition, after final judgment has been rendered,” an opportunity VMI later chose to exercise. *Id.*

46. *VMI II*, 976 F.2d at 900.

47. Mary Baldwin College is a well known women’s college located in Staunton, Virginia, less than an hour’s drive from VMI. It was founded in 1842 and has been repeatedly ranked by *U.S. News & World Report* as one of the ten Best Regional Liberal Arts Colleges in the South. See *Best Re-*

The DOJ opposed the remedy, arguing *inter alia* that VWIL was not comparable to VMI because it did not mirror VMI's adversative method but was instead based on a more supportive system.<sup>48</sup> VMI defended the difference in methodology, arguing that experts in women's education designed the program for the developmental needs of young women and that the end result of each of the programs would be the same: the development of citizen-soldiers.<sup>49</sup>

As stated by the district court, the "overarching question" in the remedial trial was: "[W]hat does the Fourth Circuit's opinion require of a proposed plan in order to pass constitutional muster?"<sup>50</sup> The DOJ contended that Virginia was required by the Fourth Circuit to "create a separate institution which closely resembles, if not clones, the physical plant, the curriculum, the methodology, the prestige, and many of the other attributes of VMI."<sup>51</sup> VMI disagreed, arguing that the Fourth Circuit allowed the Commonwealth far more latitude.<sup>52</sup> While both sides found support for their views in parts of the Fourth Circuit opinion,<sup>53</sup> VMI relied heavily upon a passage in the Fourth Circuit's 1993 decision in *Faulkner v. Jones*,<sup>54</sup> which was decided by the court of appeals after *VMI*. In *Faulkner*, the coeducation suit brought against The Citadel, the Court gave additional guidance as to what it had intended by its decision in *VMI*:

[A]ny analysis of [a parallel program] in response to a justified purpose, must take into account the nature of the difference on which the separation is based, the relevant benefits to and the needs of each gender, the demand (both in terms of quality and quantity), and any other relevant factor. In the end, distinctions in any separate facilities provided for males and females may be based on real differences between the sexes, both in quality and quantity, so long as the distinctions are not based on stereotyped or generalized perceptions of differences.<sup>55</sup>

The district court recognized that the VWIL program was not a mirror image of VMI and that, if such an exact replication of VMI was required, VWIL would not pass muster.<sup>56</sup> The district court concluded, however, based largely on the Fourth Circuit's commentary in *Faulkner*, that VWIL need not pass such a stringent requirement.<sup>57</sup> After reviewing the similarities and differences between the VWIL and VMI programs, the district court concluded that:

[VWIL] provide[s] an all-female program that will achieve substantially similar outcomes in an all-female environment and that there is a legitimate pedagogi-

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*gional Liberal Arts Colleges*, U.S. NEWS & WORLD REP., Sept. 16, 1996, at 117; *Top Regional Liberal Arts Colleges*, U.S. NEWS & WORLD REP., Sept. 18, 1995, at 140; *Regional Liberal Arts Colleges*, U.S. NEWS & WORLD REP., Sept. 26, 1994, at 114; *Regional Liberal Arts Colleges*, U.S. NEWS & WORLD REP., Oct. 4, 1993, at 123; *Marks of Distinction*, U.S. NEWS & WORLD REP., Oct. 16, 1989, at 76.

48. See *VMI III*, 852 F. Supp. at 473, 477-78.

49. See *id.* at 476.

50. *Id.* at 474.

51. *Id.* at 475.

52. See *id.* at 473.

53. See *id.* at 474-75.

54. 10 F.3d 226 (4th Cir. 1993).

55. *Id.* at 232.

56. See *VMI III*, 852 F. Supp. at 473.

57. See *id.* at 475.



cal basis for the different means employed to achieve the substantially similar ends. VWIL satisfies the Fourth Circuit's requirement that the Commonwealth adopt a parallel program for women which takes into account the differences and needs of each sex.<sup>58</sup>

The "substantially similar outcome" to which the district court referred was the production of "female citizen-soldiers."<sup>59</sup> The "different means employed" by VWIL included "a cooperative method which reinforces self-esteem rather than the leveling process used by VMI," a "highly structured program but without the extreme adversative VMI components, such as the rat line."<sup>60</sup> The "legitimate pedagogical basis" was expert testimony that an adversative method of teaching in an all-female school would be "not only inappropriate for most women, but counterproductive."<sup>61</sup> The evidence supporting use of a non-adversative method at VWIL also included expert opinion that an all-female adversative program would attract too few students to make the program viable.<sup>62</sup> On April 29, 1994, the district court approved VWIL as an appropriate remedial measure,<sup>63</sup> and the case was appealed to the Fourth Circuit.<sup>64</sup>

In a 2-1 decision written by Circuit Judge Paul V. Niemeyer, the Fourth Circuit also approved VWIL,<sup>65</sup> following essentially the same rationale as the district court. The dissenting member of the panel, Senior Circuit Judge J. Dickson Phillips, described the sort of "substantial comparability" between parallel single-sex programs that he thought might survive equal protection scrutiny, but found the VWIL program deficient.<sup>66</sup> Judge Phillips declared that he would order the state supported, male-only policy at VMI ended "either by abandoning the policy or by foregoing further state support for the institution."<sup>67</sup> Judge Phillips was supported by several other judges who, *sua sponte*, sought a rehearing en banc, an effort that failed<sup>68</sup> but that produced a dissenting opinion authored by Circuit Judge

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58. *Id.* at 481.

59. *Id.* at 478.

60. *Id.* at 476.

61. *Id.* This expert opinion was advanced by the testimony of several professionals experienced in the education of young women, including: Dr. Cynthia Tyson, President of Mary Baldwin College (former President of the Southern Association of Colleges for Women and Commissioner of the Southern Association of Colleges and Schools); Dr. Elizabeth Anne Fox-Genovese, professor of history and the Eleonore Raoul Professor of the Humanities at Emory University in Atlanta, Georgia; David Riesman, Henry Ford II Professor of Social Sciences, Emeritus, at Harvard University; and Dr. Richard C. Richardson, Jr., professor of education leadership and policy studies at Arizona State University.

62. *See VMI III*, 852 F. Supp. at 480, 481 n.12.

63. *See id.* at 484.

64. *See VMI IV*, 44 F.3d at 1229.

65. *VMI IV*, 44 F.3d at 1250. In keeping with the Fourth Circuit's Internal Operating Procedure 34.1, the same judges who heard the first appeal also heard the second. Judge Niemeyer was joined by Senior District Judge Hiram H. Ward.

66. *Id.* For a discussion of the substantial comparability between parallel single-sex programs that might survive equal protection scrutiny, see *infra* notes 161-75 and accompanying text discussing the Phillips Paradigm.

67. *VMI IV*, 44 F.3d at 1243.

68. *See Virginia*, 52 F.3d at 91. The vote on the motion to rehear the case en banc was six for, four against, and three recused. Under the rules of the Fourth Circuit, a majority of all circuit judges in regular active service is required to obtain a hearing en banc. *See* Local Rule 35(b).

Diana Gribbons Motz, who was joined by Circuit Judges Hall, Murnaghan, and Michael.<sup>69</sup> Judge Motz, like Judge Phillips, found the differences between the two programs to be too great to allow VWIL to serve as a remedy for the exclusion of women from VMI.<sup>70</sup> She also agreed that Virginia must either force VMI to admit women or end public support.<sup>71</sup>

The Department of Justice then petitioned the Supreme Court for a writ of certiorari to the Fourth Circuit, challenging the remedial ruling in favor of VMI and VWIL.<sup>72</sup> VMI filed a cross-petition seeking Supreme Court review of the 1992 Fourth Circuit ruling on the issue of liability.<sup>73</sup> Both petitions were granted and the cases were argued before eight Justices of the Supreme Court on January 17, 1996.<sup>74</sup> The Court announced its decision on June 26, 1996, upholding the Fourth Circuit in its finding of liability but overturning its decision on the adequacy of VWIL as a remedy, labeling the new program a "'pale shadow' of VMI."<sup>75</sup> Justice Ruth Bader Ginsburg wrote the opinion of the Court, and was joined by five others: Justices John Paul Stevens, Sandra Day O'Connor, Anthony Kennedy, David Souter, and Steven Breyer.<sup>76</sup> Chief Justice William Rehnquist filed an opinion concurring in the judgment.<sup>77</sup> Justice Antonin Scalia filed a dissenting opinion.<sup>78</sup> Following this decision, VMI and its codefendants, including its alumni groups, considered the options left available to them: the admission of women into VMI or the privatization of the Institute.<sup>79</sup> On September 21, 1996, the VMI Board of Visitors voted 9 to 8 to admit women into the Corps of Cadets, beginning August of 1997.<sup>80</sup>

### III. THE VALUE OF SINGLE-SEX EDUCATION

One of the central tenets of VMI's case throughout the litigation was the value of single-sex education. It was a value expressly recognized by the district court:

69. *See id.*

70. *See id.* at 93.

71. *See id.* at 93-94.

72. *See* Brief for Petitioners, *VMI V*, 116 S. Ct. 2264 (1996) (No. 94-1941) [hereinafter Brief for Petitioners].

73. *See* Brief for Cross-Petitioners, *VMI V*, 116 S. Ct. 2264 (1996) (Nos. 94-1941, 94-2107) [hereinafter Brief for Cross-Petitioners]. VMI's original appeal on liability was denied until the issue had reached final resolution in the lower courts. *See supra* note 45.

74. Justice Clarence Thomas took no part in the consideration or decision of the case. In keeping with prevailing practice, Justice Thomas did not state on the record his reasons for recusal; however, it is known that his son, Jamal, attended VMI and was a first classman there when the case came before the Supreme Court during the October 1995 term. *See* Aaron Epstein, *Court Ruling Breaks All-Male School Barriers*, HERALD-SUN (Durham, N.C.), June 27, 1996, at A1.

75. *VMI V*, 116 S. Ct. at 2285 (quoting *VMI IV*, 44 F.3d at 1250). For a vigorous defense of VWIL, see Brief of Mary Baldwin College as Amicus Curiae in Support of Respondents, *VMI V*, 116 S. Ct. 2264 (1996) (Nos. 94-1941, 94-2107) [hereinafter Mary Baldwin College Brief]. Notwithstanding the loss by VMI and the Supreme Court's criticism of VWIL, Mary Baldwin College intends to continue its unique program. *See* Kathryn Darling, *Granby Grad Accepts Challenges of VWIL*, VIRGINIAN-PILOT (Norfolk, Va.), Oct. 17, 1996, at 3.

76. *See VMI V*, 116 S. Ct. at 2269.

77. *See id.* at 2287. (Rehnquist, C.J., concurring).

78. *See id.* at 2291 (Scalia, J., dissenting).

79. *See* discussion *supra* note 3.

80. *See* Baker, *supra* note 1, at A1.

“A substantial body of ‘exceedingly persuasive’ evidence supports VMI’s contention that some students, both male and female, benefit from attending a single-sex college. For those students, the opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement.”<sup>81</sup>

The district court relied in part on the writings of Dr. Alexander Astin,<sup>82</sup> whose book, *Four Critical Years*,<sup>83</sup> was introduced into evidence by VMI. Astin’s work, previously cited by Justice Lewis Powell in his dissent in *Hogan*,<sup>84</sup> was used by the district court as part of its basis for an array of findings supporting the view that for at least some students “single-sex colleges provide better educational experiences than coeducational institutions.”<sup>85</sup> As the district court wrote:

Students of both sexes become more academically involved, interact with faculty frequently, show larger increases in intellectual self-esteem and are more satisfied with practically all aspects of college experience (the sole exception is social life) compared with their counterparts in coeducational institutions. Attendance at an all-male college substantially increases the likelihood that a student will carry out career plans in law, business and college teaching, and also has a substantial positive effect on starting salaries in business. Women’s colleges increase the chances that those who attend will obtain positions of leadership, complete the baccalaureate degree, and aspire to higher degrees.<sup>86</sup>

The district court also relied upon testimony from one of the DOJ’s expert witnesses, Dr. Clifton Conrad, who “not only acknowledged the broad empirical support for the value of single-sex education, [but] also described *himself* as a ‘believer in single-sex education.’”<sup>87</sup> Other expert evidence upon which the district court relied included the testimony of David Riesman,<sup>88</sup> Major General Josiah

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81. *VMI I*, 766 F. Supp. at 1411-12 (citations omitted).

82. Notwithstanding his belief in the value of single-sex education, Dr. Astin testified on behalf of the DOJ as an expert witness in the remedial trial, an interesting twist that arose from Dr. Astin’s view that “some compromise in the quality of education is the price we must pay if we are to achieve fairness and equity.” *VMI III*, 852 F. Supp. at 479 (citations omitted). Although Dr. Astin would allow single-sex education in private institutions, the district court described his public-private distinction as an “ethical quagmire” that would result in the benefits of single-sex education being denied to students from middle and lower income families. *See id.*

83. ALEXANDER ASTIN, *FOUR CRITICAL YEARS* (1977).

84. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 738-39 (1982).

85. *VMI I*, 766 F. Supp. at 1412.

86. *Id.*

87. *Id.* at 1434-35 (emphasis added). Dr. Conrad appeared as a witness against VMI not because of his concern about the educational quality of single-sex institutions, but because of his personal philosophical view that public institutions should be open to both sexes. *See id.* at 1412. Dr. Conrad is Professor of Higher Education at the University of Wisconsin-Madison. *See id.* at 1416.

88. David Riesman is the Henry Ford II Professor of Social Sciences, Emeritus, at Harvard University. *See VMI III*, 852 F. Supp. at 488.

Bunting III,<sup>89</sup> Dr. Richard C. Richardson Jr.,<sup>90</sup> and the published work of Marvin Bressler and Peter Wendell.<sup>91</sup>

The Fourth Circuit underscored the value of single-sex education, saying on the first appeal, "[W]hile the data support a pedagogical justification for a single-sex education, they do not materially favor either sex. Both men *and* women appear to have benefited from single-sex education in a materially similar manner."<sup>92</sup> The Fourth Circuit reaffirmed its conclusions about the value of single-sex education during the second appeal: "Just as a state's provision of publicly financed education to its citizens is a legitimate and important governmental objective, so too is a state's opting for single-gender education as one particular pedagogical technique among many."<sup>93</sup>

The decision by the Supreme Court to hear the case against VMI brought forth an array of allies filing amici curiae briefs in support of the Institute and single-sex education.<sup>94</sup> Some of the amici, such as The Citadel and the Independent Women's Forum,<sup>95</sup> were expected stalwarts. Others, such as University of Southern

89. Now the Superintendent of VMI, Major General Bunting previously presided over the successful coeducation of a previously all-male school, The Lawrenceville School near Princeton, New Jersey, where he served as headmaster from 1987 to 1993. *See id.* at 486. He has also served as president of Hampden-Sydney College, a men's college in Virginia, and as President of Briarcliff College, a women's college in New York. *See id.*

90. Dr. Richard C. Richardson, Jr., is a professor of education leadership and policy studies at Arizona State University. *See id.* at 487.

91. *See* Marvin Bressler & Peter Wendell, *The Sex Composition of Selected Colleges and Gender Differences in Career Aspirations*, 51 J. HIGHER EDUC. 1980, No. 6, at 650, 662 (1980) (providing support for the proposition that students are positively affected by attending a single-sex college, especially in their openness to career choices generally associated with the opposite sex).

92. *VMI II*, 976 F.2d at 897-98. *But see VMI I*, 766 F. Supp. at 1414 ("[T]he beneficial effects of single-sex education are stronger among women than men.").

93. *VMI IV*, 44 F.3d at 1239.

94. Nine amici curiae briefs were filed in support of VMI, including briefs by Wells College, Southern Virginia College, and St. Mary's College; the state of South Carolina and The Citadel; Wyoming and Pennsylvania; a group of educators including Dr. Kenneth E. Clark and Professor Susan Estrich; the Independent Women's Forum, Linda Chavez (Director, U.S. Commission on Civil Rights, 1983-85), and Lynn V. Cheney (Chairman, National Endowment for the Humanities, 1986-92); The Center for Military Readiness, Family Research Council, and the Eagle Forum; Mary Baldwin College; the South Carolina Institute of Leadership; and Women's Schools Together, Boys' School: An International Coalition; and Robert Bobb (City Manager, City of Richmond, Va.).

Similarly, eight amici curiae briefs were filed in opposition to VMI, including briefs by Nancy Mellette (a female applicant for admission to The Citadel); the Lawyers Committee for Civil Rights Under Law; the National Women's Law Center, the American Civil Liberties Union, the American Association for University Women, and B'nai B'rith Women; Employment Law Center; a group of retired female military officers in conjunction with an organization called Women Active in Our Nation's Defense, Their Advocates and Supporters (WANDAS); the American Association of University Professors; the states of Maryland, Hawaii, Massachusetts, Nevada, and Oregon, and the Northern Mariana Islands; and a group of twenty-six private women's colleges. All individuals appeared in their personal capacities.

95. The Independent Women's Forum (The Forum) is a "nonprofit, nonpartisan organization founded by women to foster public education and debate about social and economic policies, particularly those affecting women and families." Brief of Amici Curiae Independent Women's Forum et al. at 1, *VMI V*, 116 S. Ct. 2264 (1996) (Nos. 94-1941, 94-2107). The Forum "supports policies that promote individual responsibility, limited government and economic opportunity." *Id.* at 1-2. The Forum, formerly known as the Women's Washington Issues Network, previously filed a brief amicus curiae in support of the 1993 petition for certiorari by VMI. *See id.* at 2.

California Professor of Law Susan Estrich,<sup>96</sup> showed the breadth of support across the political spectrum for the right of educational choice that VMI's case embodied. The briefs filed by these amici collectively present a persuasive case for the importance of single-sex education in the public life of America.

Much of the discussion by the VMI amici underscored<sup>97</sup> and updated<sup>98</sup> the empirical evidence and expert opinions cited by the lower courts to justify single-sex colleges. But other amici arguments focused on the benefits of single-sex education at the elementary and secondary levels.<sup>99</sup> This was an issue that did not concern the lower courts in *VMI*, but that became critical once certiorari was granted. It was apparently recognized that a decision by the Supreme Court, if made without information about these public school programs, might well destroy them without full consideration of their benefits, and might do so unintentionally. The amici briefs highlighted the reasons why many public school systems across the country are interested in programs that teach boys and girls separately.

One group of amici,<sup>100</sup> represented by former United States Senator John C. Danforth (R-Mo.), called to the attention of the Court the work of Cornelius Riordan, whom they quoted for his emphatic advocacy of single-sex education:

96. Now a well-known commentator on public affairs, Susan Estrich first gained widespread recognition as the campaign manager for the 1988 Democratic presidential nominee, Michael Dukakis. See Robin Toner, *Women Taking Major Roles in '88 Presidential Campaigns*, N.Y. TIMES, Dec. 29, 1987, at A1.

97. See, e.g., Brief Amici Curiae in Support of Respondents by Dr. Kenneth E. Clark et al., *VMI V*, 116 S. Ct. 2264 (1996) (No. 94-1941) [hereinafter Clark Brief], relying heavily on the work of M. Elizabeth Tidball for the conclusion that "graduates of women's colleges are more likely to become achievers than are the women graduates of coeducational institutions." *Id.* at 10 n.9 (citing M. Elizabeth Tidball, *Women's Colleges: Exceptional Conditions, Not Exceptional Talent, Produce High Achievers*, in EDUCATING THE MAJORITY 157, 160 (Carol Pearson et al. eds., 1989)). See generally M. Elizabeth Tidball & Vera Kistiakowsky, *Baccalaureate Origins of American Scientists and Scholars*, 193 SCIENCE, 1976, at 646, 646 (1976) (discussing the entry of women into the sciences); M. Elizabeth Tidball, *Baccalaureate Origins of Entrants into American Medical Schools*, 56 J. HIGHER EDUC. 385, 385 (1985) (discussing research on the entry of women into medical schools); M. Elizabeth Tidball, *Baccalaureate Origins of Recent Natural Science Doctorates*, 57 J. HIGHER EDUC. 606, 606 (1986) (stating that in one study of higher education, "half or more of the most productive colleges [for women] were women's colleges.").

98. See, e.g., Brief Amici Curiae of Wells College et al. at 4, *VMI V*, 116 S. Ct. 2264 (1996) (Nos. 94-1941-2107) (noting that "several studies published since the Fourth Circuit Court's ruling confirm its conclusion that single-gender education offers significant advantages when compared to coeducation.") (citing Mikyong Kim & Rodolfo Alvarez, *Women-Only Colleges: Some Unanticipated Consequences*, 66 J. HIGHER EDUC. 641, 642 (1995) (discussing the efficacy of women-only schools); Daryl G. Smith et al., *Paths to Success: Factors Related to the Impact of Women's Colleges*, 66 J. HIGHER EDUC. 245 (1995) (discussing the factors related to success for women at coeducational and single sex schools); AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., GROWING SMART: WHAT'S WORKING FOR GIRLS IN SCHOOL, EXECUTIVE SUMMARY AND ACTION GUIDE (Oct. 1995)).

99. See, e.g., Brief of Amici Curiae States in Support of the Commonwealth of Virginia at 8-11, *VMI V* (Nos. 94-1941, 94-2107) [hereinafter States Brief] (discussing "experimentation with single-sex schools at the secondary level as a means of breaking the cycle of despair" in inner-cities and the benefits of single-sex education for girls in math and science classes at the secondary level); Mary Baldwin College Brief, *supra* note 75, at 8-12; Amici Curiae Brief of Women's Schools Together, Inc. et al. at 14-22, *VMI V*, 116 S. Ct. 2264 (1996) (Nos. 94-1941, 94-2107) [hereinafter Women's Schools Together Brief].

100. For a complete list of the amici see the inside cover of the Women's Schools Together Brief, *supra* note 99.

Single gender schools generally are more effective academically than coeducational schools. This is true at all levels of school, from elementary to higher education. Over the past decade, the data consistently and persistently confirm this hard-to-accept educational fact.

Single-gender schools work. They work for girls and boys, women and men, whites and nonwhites. Research has demonstrated that the effects of single gender schools are greatest among students who have been disadvantaged historically—females and racial/ethnic/religious minorities (both males and females).<sup>101</sup>

As suggested by Riordan, the communities now experimenting with single-sex public education are chiefly concerned with two types of programs: all-male academies in the inner-cities and all-female math and science classes.

#### A. All-Male, Inner-City Academies

The Danforth amici presented the history of efforts by the city of Detroit to establish all-male academies. Those efforts were a response to the disproportionately high rate of educational and social problems experienced by inner-city males:

Of the 24,000 males enrolled in the Detroit public high schools, fewer than 30% had cumulative grade point averages above 2.0. Boys were suspended from Detroit public schools at three times the rate of girls. Sixty percent of the drug offenses in Wayne County were committed by 8th and 9th grade dropouts, and 97% of the offenders were African American males.<sup>102</sup>

In response to these problems, the city of Detroit designed an all-male academy to offer boys “self-esteem, rites of passage, role model interaction and academic improvement.”<sup>103</sup> Detroit made 560 seats available; 1200 boys applied.<sup>104</sup> Despite the crying need for a change in its educational offerings and the overwhelming response from its students, Detroit was not allowed to pursue its reform.<sup>105</sup> Faced with the high cost of defending a lawsuit and disheartened by a preliminary injunction entered by a federal court, Detroit abandoned the idea.<sup>106</sup>

Detroit is not the only city to have sought a desperately needed solution to the plight of its young men, nor is it the only city forced to abandon its plans in the face of opposition from ideological adversaries of single-sex education. Philadelphia’s successful all-male program was canceled after the American Civil Liberties Union threatened it with a lawsuit.<sup>107</sup> Miami was also interested, but its efforts ended when they drew the wrath of the federal Department of Education

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101. Cornelius Riordan, *Reconsidering Same Gender Schools: The VMI Case and Beyond*, EDUC. WK., Feb. 23, 1994, at 48, cited in Women’s Schools Together Brief, *supra* note 99, at 14.

102. Women’s Schools Together Brief, *supra* note 99, at 17-18 (citing Det. Pub. Schools, Male Academy Grades K-8: A Demonstration Program for At-Risk Males 15-16 (Dec. 7, 1990) (working draft) (footnotes omitted)).

103. *Id.* at 18 (citing Kristin Caplice, *The Case for Single Sex Education*, HARV. J.L. & PUB. POL’Y 275, 227 (1994)).

104. See *id.*

105. See *id.* at 19.

106. See *id.* at 20.

107. See States Brief, *supra* note 99, at 9.

(DOE).<sup>108</sup> Undaunted, or perhaps unchallenged, the principals of some coeducational elementary schools in Baltimore continue to offer all-male classes.<sup>109</sup> The General Assembly of Virginia has expressed its support for single-sex education in the public schools,<sup>110</sup> and more recently, Leonidas B. Young, a city councilman and former mayor of the city of Richmond, has proposed the creation of an academy for at-risk middle school boys to be funded by a combination of public and private sources.<sup>111</sup>

Whatever views lawyers or judges may have about the constitutional status of inner-city, all-male academies, there remains a strong view among many educators that such schools are a sorely needed alternative:

The lives of inner-city youth are so much at risk . . . that radical measures are in order. And the principle behind this particular measure is a sound one. In fact, it is not especially radical . . . .

In communities with strong fathers at home and positive male role models in the neighborhood, coed schools . . . can do a decent job in educating and socializing boys. But where those other conditions have broken down, the idea of all-male schools run by men makes sense. These might or might not be boarding schools. That would depend on the local situation. They don't have to be military schools, but—in this age of commitment to diversity—that option ought certainly to be entertained.<sup>112</sup>

#### B. All-Female Math and Science Classes

Prominent among the facts reported to the Court by VMI's amici was the use of all-female math and science classes as a way to "help offset the traditional male dominance in these subjects."<sup>113</sup> In its amicus brief, Mary Baldwin College did not confine itself to the collegiate experience but also addressed secondary schools. It relied upon the findings of Riordan for the proposition that "girls in the single-sex schools score[d] about one-third of a grade equivalent higher than girls in mixed-sex schools, scoring almost one full year higher in science."<sup>114</sup> In its amicus brief, Mary Baldwin also cited a study by Professors Valerie Lee and Anthony Bryk which found that "girls from the single-sex schools were more likely [than girls in coeducational schools] to express specific interests in both mathematics and English."<sup>115</sup> As Professor Estrich suggested, "if the problem is that women don't do

108. *See id.*

109. *See* Bowler, *supra* note 5, at 2C.

110. Adopted in 1995, VA. CODE ANN. § 22.1-212.1:1 provides: "Consistent with constitutional principles, a school board may establish single-sex classes in the public schools of the school division."

111. *See* Gordon Hickey, *Special School for At-Risk Children*, RICH. TIMES-DISPATCH, Nov. 15, 1996, at B1.

112. States Brief, *supra* note 99, at 8 (citing WILLIAM KILPATRICK, *WHY JOHNNY CAN'T TELL RIGHT FROM WRONG* 234, 236 (1992)).

113. States Brief, *supra* note 99, at 9.

114. Mary Baldwin College Brief, *supra* note 75, at 11 (citing CORNELIUS RIORDAN, *GIRLS AND BOYS IN SCHOOL: TOGETHER OR SEPARATE?* 112 (1990)).

115. *Id.* at 9 (citing Valerie E. Lee & Anthony S. Bryk, *Effects of Single-Sex Secondary Schools on Student Achievement and Attitudes*, 78 J. EDUC. PSYCHOL. 387 (1986)).

well in math and science, then single-sex classes, and single-sex schools, may be part of the answer.”<sup>116</sup>

The city of Ventura, California, attempted such an answer. In a well-publicized endeavor, Ventura recently inaugurated all-female high school math classes,<sup>117</sup> only to be told by the DOE that it could not provide such a benefit to its young women.<sup>118</sup> In order to satisfy Alice-In-The-Beltway,<sup>119</sup> the all-female classes had to be given a new name: classes for the “mathematically challenged.”<sup>120</sup> As Professor Estrich wrote:

If girls don't want to go to all-girls schools, or if parents don't want to send them, that's their choice. If the experiments with girls-only math classes or boys-only classes should fail, then educators can be trusted to abandon them. But short of that, let the educators and the parents and the students decide, and leave the lawyers and judges out of it.<sup>121</sup>

The antagonism shown by the federal government to single-sex education is all the more galling because even the federal government's own educational researchers have recognized the benefits of such programs. “Single-sex schools contribute to the diversity that is a special feature of American education. The disappearance of these institutions from the educational landscape should be a matter of concern to all of us who treasure that diversity.”<sup>122</sup> Now that *VMI* has been decided, those who “treasure that diversity” should be especially concerned that the decision not be misapplied so as to eradicate single-sex education in public schools.

#### IV. LOOKING FOR THE LESSON OF *VMI*

*VMI* is the first case on single-sex education to be taken up by the Supreme Court since 1982 when it ruled in *Mississippi Univ. for Women v. Hogan*<sup>123</sup> that a women's nursing school run by the State of Mississippi could not exclude a man wishing to study nursing there. *VMI* is not likely to be the last such case. Although publicly operated single-sex institutions are now extinct at the college and graduate level,<sup>124</sup> ongoing attempts by some communities to revive this traditional ap-

116. See Estrich, *supra* note 5, at 39; see also Women's Schools Together Brief, *supra* note 99, at 22 (“[S]ame-gender classes have been proven extremely effective in addressing [the math needs of female students].” (citation omitted)).

117. See Catherine Saillant, *West Ventura County Focus: Ventura; New Math Class Recruiting Method*, L.A. TIMES (Ventura, Cal.), Feb. 4, 1995, at B2.

118. See States Brief, *supra* note 99, at 9.

119. See *supra* note 6.

120. See Catherine Saillant, *Ventura's All-Girl Math Classes Pass Test on Bias; U.S. Civil Rights Authorities Suggest Courses Be Renamed but Find They Do Not Discriminate Against Boys*, L.A. TIMES (Ventura, Cal.), Mar. 8, 1995, at B1.

121. Estrich, *supra* note 5, at 39.

122. Diane Ravitch, *Foreword* to OFFICE OF EDUC. RES. & IMPROVEMENT OF THE U.S. DEP'T OF EDUC., SINGLE SEX SCHOOLING: PERSPECTIVES FROM PRACTICE AND RESEARCH i, i (1993) [hereinafter SINGLE SEX SCHOOLING].

123. 458 U.S. 718 (1982).

124. Publicly operated Douglass College in New Brunswick, New Jersey, is technically a women's college, but it shares the campus of the much larger and coeducational Rutgers University. See *VMI I*, 766 F. Supp. at 1420. Moreover, cross-enrollment of classes is permitted, so that much of the authentic single-sex experience is lost. See *id.* All other women's colleges remaining in the United



proach in their elementary and secondary schools are almost certain to invite new litigation.<sup>125</sup>

Although seven of the Justices found their way to the same result in *VMI*—six of them by the same route—they did not mark their path well enough to be easily followed by lawyers or judges. Indeed, at times, the trail of their logic seemed to disappear entirely, only to reappear again far ahead, but with little clue as to how the Court crossed the intervening obstacles. Such a state of affairs inevitably invites disagreement among lower courts. Sooner or later, the Supreme Court will undoubtedly be forced to come back to the issue of single-sex public education in order to mark its path more clearly.<sup>126</sup> In the meantime, it is possible to discern in *VMI* at least the outlines of the trail the Court appears to have trod and to point out which legal fences were broken—and which were not—as the Court pushed to its destination.

#### A. Single-Sex Public Education Is Not Unconstitutional Per Se

The first issue that must be addressed is whether single-sex public education is now unconstitutional per se. This must be addressed not only because of the nature of the *VMI* case, but also because there are certain groups that desire to use the courts to exterminate this form of public choice in the name of sexual equality.<sup>127</sup> Those who favor such radical legislation from the bench may feel cheered,

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States are private. *See id.* The last publicly operated men's colleges were *VMI* and The Citadel. *See id.*

125. For example, the Young Women's Leadership School in East Harlem, *see supra* note 2, has been threatened with litigation by the New York Civil Liberties Union and the National Organization for Women. *See also* Valorie K. Vojdik, *Girls' Schools After VMI: Do They Make The Grade?*, 4 DUKE J. GENDER L. & POL'Y 69, 96 (1997); *Back off, Meddlers; Give Single-Sex Classes a Chance*, USA TODAY (Arlington, Va.), Oct. 15, 1996, at 14A. While not precisely the same issue, no one should be surprised to see future legal challenges to the many forms of public assistance afforded private single-sex schools and colleges, including favorable tax treatment and tuition assistance grants.

126. When it does return to the issue, a majority of Justices then sitting may well decide to read their own policy preferences into the Constitution, just as Justice Scalia accused the majority of doing in *VMI*. *See VMI V*, 116 S. Ct. at 2301. Such storms of judicial legislation are much like tornadoes: everyone knows they come from time to time, but no one knows in advance when or where they will strike. Still life must go on, and so must the business of lawyering. Those who argue cases must think and act as if the answers to future legal issues can truly be gleaned from the published writings of the Court.

127. In *VMI V*, a number of groups and individuals joined as amici curiae in a brief expressing their view that "the State can assert no cognizable interest in discriminating on the basis of sex among potential students—even if some students may arguably benefit." Brief Amici Curiae in Support of Petitioner by the American Association of University Professors et al. at 18, *VMI V*, 116 S. Ct. 2264 (1996) (No. 94-1941). These amici recognized the benefits of single-sex programs for females, but expressed strong skepticism about the legality of the practice: "As a legal matter, programs designed for women and girls are justifiable, if at all, on the ground that they counteract the consequences of the discrimination many females still experience." *Id.* at 26 n.73. (citing Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994)).

Males, these amici argued, not only fail to benefit from single-sex education but simply become more "sexist," so that the state could never justify giving them such an opportunity. *See id.* at 26. These amici appeared unconcerned that principles of academic freedom would be seriously implicated if communities were forbidden to organize their schools in the way they thought best because of the judiciary's fear of what might be taught. It is a point of some concern, therefore, that the majority would use a footnote in its opinion to give credence to the charge that all-male colleges are

ironically, by Justice Scalia, the last member of the Court who would willingly offer any such encouragement. In his dissent, Justice Scalia charged "Under the constitutional principles announced and applied [by the majority], single-sex public education is unconstitutional."<sup>128</sup> While many of Justice Scalia's blows on the majority are well deserved, this one hits too hard. The Court made no such sweeping pronouncement, nor does its opinion necessarily imply such a result. On the contrary, the majority went out of its way to emphasize that its decision turned on the unique nature of VMI, and that no per se condemnation of single-sex public education was implied.<sup>129</sup> Thus educational programs with facts distinguishable from VMI may be able to escape VMI's fate.

The majority first sounds the theme of uniqueness in the opening passage of its opinion. There it describes VMI as "an incomparable military college" that offers its students "unique educational opportunities."<sup>130</sup> This is a theme to which the majority repeatedly returns, calling VMI and its mission "distinctive"<sup>131</sup> and "special."<sup>132</sup> The theme of the opinion builds in intensity where the Court notes that VMI is "extraordinarily challenging" and that "women have *no opportunity anywhere* to gain the benefits of [the system of education at VMI]."<sup>133</sup>

This is no mere embellishment. The theme is fundamental and it rises to a crescendo in the central passages of the opinion:

The cross-petitions in this case present two ultimate issues. First, does Virginia's exclusion of women from the educational opportunities provided by VMI—*extraordinary opportunities* for military training and civilian leadership development—deny to women "capable of all of the individual activities required of VMI cadets," the equal protection of the laws guaranteed by the Fourteenth Amendment? Second, if VMI's "*unique*" situation . . .—as Virginia's *sole* single-sex public institution of higher education—offends the Constitution's equal protection principle, what is the remedial requirement?<sup>134</sup>

Finally, the theme of uniqueness is heard again, in a kind of counterpoint, in a key footnote describing what the Court is—and is not—deciding:

We do not question the State's prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as

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"likely to be a witting or unwitting device for preserving tacit assumptions of male superiority—assumptions for which women must eventually pay." *VMI V*, 116 S. Ct. at 2277 n.8 (quoting C. JENKS & D. RIESMAN, *THE ACADEMIC REVOLUTION* 297-98 (1968)). Whatever validity such views might have had in 1968, at least one of the authors cited by the Court, Riesman, apparently thought those views were not applicable to VMI in the 1990s. Riesman was both an expert witness in support of VMI and one of the amici supporting VMI and VWIL. See Clark Brief, *supra* note 97.

128. *VMI V*, 116 S. Ct. at 2305.

129. See *id.* at 2269-71, 2274, 2276-77, 2283.

130. See *id.* at 2269.

131. See *id.* at 2271.

132. *Id.* at 2270.

133. *Id.* at 2270-71 (emphasis added) (quoting *VMI I*, 766 F. Supp. at 1421); see also *id.* at 2283 ("No other school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI.") (quoting *VMI I*, 766 F. Supp. at 1421). But see Faulkner v. Jones, 10 F.3d 226, 229 (4th Cir. 1993) (referring to The Citadel's "adversative military methodology" as "similar to that employed by the Virginia Military Institute.").

134. *VMI V*, 116 S. Ct. at 2274 (emphasis added).

“unique,” an opportunity available only at Virginia’s premier military institute, the State’s sole single-sex public university or college.<sup>135</sup>

With the majority opinion being thus composed, it should be plain that the uniqueness of VMI was pivotal to the case. In response to Justice Scalia’s fear for the safety of single-sex education, the Court said “the dissent sees fire where there is no flame.”<sup>136</sup> While this disclaimer may provide some reassurance, those who favor allowing public choice on this issue should be pardoned if they check to see whether the decision in *VMI* equips their opponents with a can of gasoline to douse on the next case that arises.<sup>137</sup> Thus, while no per se ban on single-sex public education can be found, the decision must still be combed for principles that may have a more general application.<sup>138</sup>

#### B. Single-Sex Public Education Still Must Be Judged by Intermediate Scrutiny—Not Strict Scrutiny

Justice Scalia charged that the *VMI* decision means “for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny.”<sup>139</sup> In future litigation, those groups who urged the Court to adopt strict scrutiny for sex-based classifications may gleefully hold aloft this part of the dissent as if it were a prize wrested from a foe in battle.<sup>140</sup> Their joy should be short-lived, however, for if the prize is tested, it will crumble in their hands. A careful analysis shows that the majority did not reach its result by distorting the law, but by ignoring the record.<sup>141</sup> It wasn’t Scylla that sank VMI’s good ship, it was Charybdis.<sup>142</sup>

135. *Id.* at 2276 n.7 (emphasis added) (citations omitted).

136. *Id.* at 2277 n.8.

137. Before the case reached the Supreme Court, even the DOJ acknowledged that “state sponsorship of single-gender education, if provided to both genders, is not a per se denial of equal protection.” *VMI IV*, 44 F.3d at 1232. As a practical matter, this position is inconsistent with the DOJ’s argument to the Supreme Court that sex classifications should be subject to strict scrutiny.

138. As Justice Scalia correctly noted in his dissent, the Court “does not sit to announce ‘unique’ dispositions. Its principal function is to establish *precedent*—that is, to set forth principles of law that every court in America must follow.” *VMI V*, 116 S. Ct. at 2305.

139. *Id.* at 2306.

140. Among the organizations who appeared before the Supreme Court in *VMI* as amici to argue in favor of strict scrutiny were the National Women’s Law Center, the American Civil Liberties Union, the American Association of University Women, the National Education Association, the National Organization for Women, and People for the American Way. The same position was favored by the Solicitor General of the United States.

141. “The Court simply dispenses with the evidence submitted at trial—it never says that a single finding of the District Court is clearly erroneous—in favor of the Justices’ own view of the world . . . .” *VMI V*, 116 S. Ct. at 2301 (Scalia, J. dissenting); see also Broaddus, *supra* note 7, at A48 (“Unable to rebut the overwhelming evidence supporting V.M.I.’s program, the majority of the Supreme Court chose simply to ignore it . . .”).

142. VMI will find no comfort here, but others who may navigate these same judicial waters need to know the nature of the perils they must pass. In Homer’s *Odyssey*, Ulysses had to sail his vessel through a narrow strait flanked on opposite sides by the monster, Scylla, and the whirlpool, Charybdis. See THOMAS BULFINCH, *BULFINCH’S MYTHOLOGY* 244 (Crown Publishers Inc., 1979). In modern constitutional jurisprudence, litigants may be similarly imperiled. Even if familiar law is not seized and shredded, there may still be the danger of the factual record disappearing into the vortex.

In detailing his charge that the Court has now adopted strict scrutiny, Justice Scalia argued, in effect, that because VMI should have won the case under intermediate scrutiny, the Court must have held VMI to a more severe standard. He wrote:

Only the amorphous "exceedingly persuasive justification" phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI's single-sex composition is unconstitutional because there exist several women (or, one would have to conclude under the Court's reasoning, a single woman) willing and able to undertake VMI's program. Intermediate scrutiny has never required a least-restrictive-means analysis, but only a "substantial relation" between the classification and the state interests that it serves.<sup>143</sup>

What Justice Scalia may have misperceived, however, was the point at which he and the majority parted company in this case. As the dissent correctly noted, intermediate scrutiny requires a substantial relation between VMI's all-male status and the important governmental objective it serves.<sup>144</sup> That the benefits of the adversative method qualify as such an objective—at least where the absence of a parallel program is not an issue—was a point made emphatically by the district court,<sup>145</sup> affirmed by the court of appeals,<sup>146</sup> and never seriously disputed even in the Supreme Court.<sup>147</sup> Where the majority and Justice Scalia split was over the second prong of the test: whether VMI's single-sex status was substantially related<sup>148</sup> to achieving that objective. Both the district court and the court of appeals concluded, as a factual matter, that it was necessary.<sup>149</sup> The Supreme Court disagreed:

The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly

143. *VMI V*, 116 S. Ct. at 2294-95.

144. *See id.* at 2294.

145. *VMI I*, 766 F. Supp. at 1413, 1415.

146. *VMI II*, 976 F.2d at 898 ("VMI's institutional mission justifies a single-sex program . . .").

147. Of all the Justices, only Chief Justice Rehnquist doubted that this was so: "While considerable evidence shows that a single-sex education is pedagogically beneficial for some students . . . there is no similar evidence in the record that an adversative method is pedagogically beneficial or is any more likely to produce character traits than other methodologies." *VMI V*, 116 S. Ct. at 2290-91 (citation omitted). The Chief Justice's comment was roundly criticized by Justice Scalia, who correctly noted: "[T]he pedagogical benefits of VMI's adversative approach were not only proved, but were a *given* in this litigation. The reason the woman applicant who prompted this suit wanted to enter VMI was assuredly not that she wanted to go to an all-male school; it would cease being all-male as soon as she entered. *She wanted the distinctive adversative education that VMI provided . . .*" *Id.* at 2304 (emphasis added).

148. *See Hogan*, 458 U. S. at 730.

149. According to the district court:

[T]he evidence establishes that key elements of the adversative VMI educational system, with its focus on barracks life, would be fundamentally altered, and the distinctive ends of the system would be thwarted, if VMI were forced to admit females and to make changes necessary to accommodate their needs and interests.

*VMI I*, 766 F. Supp. at 1411; *see also id.* at 1413 n.8., 1441. The Fourth Circuit supported this view, stating: "The district court's conclusions that VMI's mission can be accomplished only in a single-gender environment and that changes necessary to accommodate coeducation would tear at the fabric of VMI's unique methodology are adequately supported." *VMI II*, 976 F.2d at 897.

proved, a prediction hardly different from other “self-fulfilling prophec[ies]” once routinely used to deny rights or opportunities . . . . Women’s successful entry into the federal military academies, and their participation in the Nation’s military forces, indicate that Virginia’s fears for the future of VMI may not be solidly grounded.<sup>150</sup>

If one accepts the majority’s view that VMI’s single sex-status was not substantially related to the adversative method,<sup>151</sup> then one can find the categorical exclusion of women invalid under intermediate scrutiny without having to bring in strict scrutiny through the back door.<sup>152</sup> This is particularly true given the highly individualized nature of the collegiate experience, which makes it decidedly unlike those governmental programs that can only be conducted based on averages and aggregates. The self-selection inherent in the decisions by high school seniors about where to apply, the individualized review given applications by college admissions offices, and the individualized grading process that follows those who are admitted combine to make this case different from those cited by Justice Scalia as examples of how intermediate scrutiny has been previously applied to sex classifications.<sup>153</sup> VMI’s desire to maintain its single-sex status—and the success VMI enjoyed in the lower courts—was not predicated upon the view that the “women . . .

150. *VMI V*, 116 S. Ct. at 2280-81 (footnotes and citations omitted).

151. Only history will prove whether the Supreme Court was justified in its optimism that the adversative system can thrive in a coeducational setting, or whether VMI will “eventually find it necessary to drop the adversative system altogether, and adopt a system that provides more nurturing and support for the students.” *VMI I*, 766 F. Supp. at 1413. But the Court’s reference to events at the national service academies furnishes little comfort to those who care about the future of VMI. Following coeducation of the academies, they abandoned their use of the adversative method, as was predicted by those military leaders most knowledgeable about them. *See id.* at 1438-40. If there is consolation for VMI, it is this: the national service academies operate under a mandate—even if only implied—to attract and graduate women in numbers sufficient to fill arbitrarily constructed percentages of their graduating classes. *See id.* at 1432, 1439. The academies had to adjust their training in order to attract substantially more women than those who might want the adversative system and thrive under it. VMI labors under no such compulsion. It is free to limit itself to those women—and men—who are “capable of all the individual activities required of VMI cadets.” *VMI V*, 116 S. Ct. at 2284 (quoting *VMI I*, 766 F. Supp. at 1412). VMI is resolute in its intention to do so. *See Allen, supra* note 3, at A1.

152. This logic does not work, however, if VMI’s status as a single-sex college can serve as an important governmental objective on its own merits, regardless of whether the adversative method constitutes another such objective. The district court and court of appeals held that VMI’s single-sex status did play such a role. *See VMI II*, 976 F.2d at 898. The Supreme Court did not address this issue squarely but appeared to imply that the proper focus was whether there was a reason to provide single-sex education to one sex but not the other. *See infra* notes 207-27 and accompanying text.

153. Those examples included higher social security benefits for women than men:

We reasoned that women . . . as such have been unfairly hindered from earning as much as men, but we did not require proof that each woman so benefited had suffered discrimination or that each disadvantaged man had not; it was sufficient that even under the former congressional scheme women *on the average* received lower retirement benefits than men.

*VMI V*, 116 S. Ct. at 2295 (citation omitted). Another example was the exclusion of women from selective service registration: “[W]e held that selective-service registration could constitutionally exclude women, because even assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans.” *Id.* (citation omitted).

capable of all the individual activities required of VMI cadets”<sup>154</sup> could not be reasonably identified through the application, admission, and grading process. It was predicated instead upon the view that, even assuming the admission of individually qualified women, the combination of sexes in the Corps of Cadets was inherently incompatible with the sort of adversative process that either group—men or women—could sustain in a single-sex setting.<sup>155</sup> The Court did not heed the incompatibility argument, and essentially ruled that the admission of individually qualified women would not require VMI to soften its adversative system.<sup>156</sup> By adopting its own view of the facts, the Court was able to find liability without having to invent a new legal standard.

Justice Scalia contended that, by use of the mantra “exceedingly persuasive justification,” the majority departed from intermediate scrutiny:

The Court’s nine invocations of that phrase . . . would be unobjectionable if the Court acknowledged that *whether* a justification is exceedingly persuasive must be assessed by asking [whether] the classification serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives. Instead, however, the Court proceeds to interpret “exceedingly persuasive justification” in a fashion that contradicts the reason of *Hogan* and our other precedents.<sup>157</sup>

Justice Scalia has a point. The majority’s near chanting of these words carried with it the danger that lower courts will come under the illusion that the Court has not simply used a new shorthand, but has recast the concept of intermediate scrutiny.<sup>158</sup> However, litigants may still avoid any such enchantment by focusing on that segment of the majority opinion in which the phrase was expressly equated with the familiar definition of immediate scrutiny:

[A] party seeking to uphold government action based on sex must establish an “exceedingly persuasive justification” for the classification. To succeed, the de-

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154. *Id.* at 2284 (quoting *VMI I*, 766 F. Supp. at 1412).

155. See Brief for the Cross-Petitioners, *supra* note 73, at 34-36, *VMI V* (1996) (Nos. 94-1941, 94-2107).

156. VMI’s view—and the view of its experts—as to the limited “fungibility” of men and women in an adversative setting was rejected by the Court as “stereotypical” even as the Court paradoxically acknowledged that: “[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.” *VMI V*, 116 S. Ct. at 2276 (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)). The Supreme Court’s reference to *Ballard* comes in the context of a discussion of physical differences between the sexes, a use that is far narrower than what the *Ballard* Court intended. In *Ballard*, the Supreme Court overturned a conviction and dismissed an indictment due to the systematic exclusion of women from the panels from which the petit and grand juries were drawn. In speaking of the two sexes serving on juries together, the Court said, “the subtle interplay of influence of one on the other is among the imponderables.” *Ballard*, 329 U.S. at 193-94. In the context of the adversative education system, a far hotter cauldron than the jury room, the Court essentially chose not to accept the evidence of how the interplay between the sexes may fundamentally alter the process.

157. *VMI V*, 116 S. Ct. at 2294 (citations in original).

158. Chief Justice Rehnquist was also critical of the Court for repeatedly using the phrase “exceedingly persuasive justification” and “thereby introduc[ing] an element of uncertainty respecting the appropriate test.” *Id.* at 2288. As the Chief Justice contended, “[t]hat phrase is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself.” *Id.*

fender of the challenged action must show at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.<sup>159</sup>

While the majority may conceivably include one or more justices who, if given their druthers, would ratchet up the level of scrutiny for sex-based classifications, the written opinion shows no consensus for such a change. Sex-based classifications are still to be judged by intermediate scrutiny, and intermediate scrutiny still means what it meant before.<sup>160</sup> The *VMI* decision did not turn on how the majority viewed the law, but on how they viewed—or refused to view—the facts.

#### V. THE PHILLIPS PARADIGM: A POSSIBLE SAFE HARBOR

At this stage of the analysis, three points are clear. First, at least three single-sex public education programs are unconstitutional in the eyes of the Supreme Court: the all-male VMI, the analogous all-male program at The Citadel, and the all-female nursing program at Mississippi University for Women.<sup>161</sup> Second, single-sex public education programs are not unconstitutional per se.<sup>162</sup> Third, single-sex public education programs must be judged by intermediate scrutiny—not strict scrutiny.<sup>163</sup> The obvious next question is whether there is some category of single-sex programs that are clearly constitutional.

The closest that one can come to a safe harbor of clear constitutionality is the highly symmetrical model presented by Judge Phillips in his dissent from the Fourth Circuit's approval of the VWIL plan:

If we looked for the arrangement most likely to survive scrutiny, it presumably would involve simultaneously opened single-gender undergraduate institutions having substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, and faculty and library resources. Such an arrangement would involve no gender-line discrimination in terms of tangible benefits, nor of intangible benefits such as tradition, prestige and alumni influence—as to which each starts with none. Nor could there be any stigmatic implications arising from the substantially comparable content of its educational program.<sup>164</sup>

This model was mentioned twice by the Supreme Court majority, first in the Court's recital of the history of the case,<sup>165</sup> and again in the Court's criticism of VWIL.<sup>166</sup> Despite these references, the Court stopped short of saying exactly

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159. See *id.* at 2271 (internal quotation marks and citations omitted); see also *id.* at 2275. ("The State must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.") (internal quotation marks and citations omitted).

160. See *VMI V*, 116 S. Ct. at 2292.

161. *Hogan*, 458 U.S. 718 (1982).

162. See *supra* notes 127-39 and accompanying text, discussing the constitutionality of public single-sex education.

163. See *supra* notes 139-61 and accompanying text, discussing intermediate scrutiny.

164. *VMI IV*, 44 F.3d at 1250. Judge Phillips did not decide whether, in his view, parallel arrangements meeting his paradigm would be constitutional.

165. See *VMI V*, 116 S. Ct. at 2274.

166. See *id.* at 2283 n.17.

what role it intended for the Phillips paradigm to play in its jurisprudence.<sup>167</sup> Nowhere does the Court expressly say that compliance with the paradigm is sufficient for a program to pass constitutional muster, a point that will not escape those who oppose allowing the choice of single-sex public education. But neither did the Court expressly say that compliance with the paradigm is necessary, a point that will give heart to those who favor single-sex options and who may find the Phillips paradigm to be less than pragmatic. The majority opinion is too opaque for the Court's view to be clearly discerned; however, the better reasoned view—and a view that is not inconsistent with the Court's decision—is that compliance with the paradigm is sufficient, but not necessary.

The argument in favor of the sufficiency of the paradigm is straightforward. The paradigm was deliberately drawn in such a way as to have symmetry. It posits parallel programs for men and women, opened at the same time,<sup>168</sup> and mirroring—or perhaps nearly mirroring—each other in those various components that go to make up the total educational program.<sup>169</sup> If such thorough-going parallelism

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167. At oral argument, the following exchange between the Court and Paul Bender, Deputy Solicitor General, suggested that—in January of 1996, at least—the DOJ was prepared to endorse the Phillips paradigm:

COURT: May I ask you specifically with respect to this case, do you have any quarrel with Judge Phillips, who said in dissent that if we were starting from scratch we could have in this area what we couldn't have in the race area, that is, genuine freedom of choice plan, where you would have a VMI for both sexes, and you would have a military academy for men and a military academy for women, and we're starting them all on the same day, and they all have equal funding and equal engineering and math programs. Would that be constitutional?

MR. BENDER: We have no problem with that.

COURT: Then why doesn't—

MR. BENDER: If they're equal.

Record at 16.

168. The point about simultaneous openings apparently reflects the concern that VMI, founded in 1839, has acquired such prestige and such an influential body of alumni that a newly-started program at VWIL could not be considered comparable. Judge Phillips wrote:

The student and eventual graduate of VWIL will not be able to call on the prestigious name of VMI in seeking employment or preference in her various endeavors; the powerful political and economic ties of the VMI alumni network cannot be expected to open for her; the prestige and tradition of her own fledgling institution cannot possibly ever achieve even rough parity with those of VMI. The catch-up game is an impossible one, as any honest reflection upon the matter must reveal.

*VMI IV*, 44 F.3d at 1250.

At the elementary and even secondary level, prestige and alumni influence are unlikely to be as significant as at the college level, particularly where those schools are relatively new. A school for boys begun several years after a program for girls—or vice versa—would arguably not have the same problems in “catching up” that Judge Phillips thought VWIL would have. *But see* *Bray v. Lee*, 337 F. Supp. 934, 936-37 (D. Mass. 1972); *Vorchheimer v. School Dist.*, 532 F.2d 880, 887 (3d Cir. 1976), *aff'd by an equally divided Court*, 430 U.S. 703 (1977); *supra* notes 194-201, 228-52 and accompanying text.

169. In comparing VMI and VWIL, the Supreme Court listed one additional element that it considered significant but that did not appear on Judge Phillips' list: the quality of the student body, measured by the Court in terms of Scholastic Aptitude Test (SAT) scores. *See VMI V*, 116 S. Ct. at 2284. The Phillips paradigm is best understood—and will be used here—to encompass all elements that would, as a practical matter, materially affect the quality of educational opportunity, whether or not they expressly appeared in the list presented in Judge Phillips dissent.



were not to vindicate single-sex programs, then no single-sex program could ever withstand an equal protection challenge. Single-sex education would be unconstitutional per se. As Judge Phillips noted: “*If any arrangement involving separate-but-equal single-gender institutions set in place to achieve governmental objectives of system-diversity, or of accommodating valid preferences in each gender for a single-gender educational environment, could survive equal protection scrutiny, it surely would be one such as that posited.*”<sup>170</sup> Since the majority opinion did not make any per se condemnation of single-sex education, one is entitled to conclude that compliance with the Phillips paradigm is probably sufficient. It appears to furnish a kind of safe harbor for communities wishing to offer their students the benefits of single-sex education.

It should be noted, however, that it is possible to use the paradigm in two significantly different ways and that it is not clear whether both approaches would be judicially acceptable. One way is to use the paradigm “microscopically” by assessing comparability on each of the individual components of the two educational programs, with a failure to achieve comparability on *any* component being fatal to the programs. Alternatively, one could read the paradigm “macroscopically” by assessing men’s and women’s programs on the basis of their overall comparability. This distinction did not emerge in Judge Phillips’ opinion, nor in the decision of the majority.<sup>171</sup> Chief Justice Rehnquist, however, clearly signaled his preference for the macroscopic approach over the microscopic, stating:

[T]he State does not need to create two institutions with the same number of faculty PhD’s, similar SAT scores, or comparable athletic fields. Nor would it necessarily require that the women’s institution offer the same curriculum as the men’s; one could be strong in computer science, the other could be strong in liberal arts. It would be a sufficient remedy, I think, if the two institutions offered the same quality of education and were of the same overall calibre.<sup>172</sup>

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The use of standardized test scores as an element of comparability is nevertheless problematic. In faulting VWIL for the lower SAT scores at Mary Baldwin College, the Court appeared to be making the point that the richness of a student’s educational experience is increased if her peers are academically more accomplished. In other words, lower admission scores are the mark of unfavorable treatment. On the other hand, lower test scores tend to indicate the opportunity is available to a broader number of students. Thus, lower admission scores may also be viewed as the mark of favorable treatment. For a further discussion of this problem, see *supra* notes 227-59 and accompanying text, discussing *Bray v. Lee*.

170. *VMI IV*, 44 F.3d at 1250 (emphasis added).

171. The majority opinion offers no guidance to which approach it might prefer. While the Court made comparisons of various individual elements of VMI and VWIL, this approach does not signify a preference for the microscopic, since an examination of individual elements is also needed to determine whether, when the parts are totaled, there is overall a macroscopic comparability. The Court performed such a totaling when, at the end of its comparison of individual elements, it concluded: “Virginia, *in sum*, while maintaining VMI for men only, has failed to provide any ‘comparable single-gender women’s institution.’” *VMI V*, 116 S. Ct. at 2285 (emphasis added). The remainder of the paragraph, on the other hand, leaves the distinct impression that no preference for either approach was intended: “Instead, the Commonwealth has created a VWIL program fairly appraised as a pale shadow of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence.” *Id.* (internal quotation marks omitted).

172. *Id.* at 2291 (Rehnquist, C.J., concurring in judgment) (citation omitted).

The broad sweep of equal protection is best understood to operate on a macroscopic basis.<sup>173</sup> It is at the more general, overall level—and not at the more discrete level of individual educational elements—that a government would offer its educational programs to each of the sexes. If the overall programs are substantially comparable, then neither sex is favored over the other. Moreover, a microscopic approach leaves open the difficult question of how to draw a principled line in defining the relevant elements. For example, if a court were to find that two libraries are comparable, should the court then look at the subject matter collections—science, history, literature, etc.—to determine if each collection is comparable to the corresponding collections from the other program? And should the court then look at, say, the history collections in detail to make sure they are comparable in American history, British history, Japanese history, and so on? Should the process go so far as to compare individual books or individual teachers? Such a microscopic approach makes little sense—educationally or judicially.

Another advantage of the macroscopic approach is that it allows each of the parallel single-sex programs more autonomy to make the sort of innovations that can lead to educational improvements. Suppose, for example, that two new high schools—one for boys and one for girls—are opened by a community in the same year and with exactly the same programs, resources, faculty, etc. In short, they start out satisfying both the macroscopic and the microscopic approaches to the Phillips paradigm. Then, a year or so later, the faculty and parents of the girls' school decide they want to add a new program: an exchange of students with a high school in Mexico City. Girls selected for the program will have the enviable chance to study for a semester in another country, while those students who remain at home will have the opportunity to learn from the Mexican students who visit here.

If the Phillips paradigm were to be applied macroscopically, there would be no problem with adopting such a program so long as it did not alter the overall comparability of the two schools. On the other hand, if the microscopic approach were applied, there would be significant risk in adopting the new program unless the boys' school could be persuaded to do the same thing. That school might be uninterested or it might have some other program, perhaps in science or ROTC, that it preferred to pursue but would likewise be thwarted from pursuing. In short, under the microscopic approach, each of the schools must proceed in lock-step, always taking care not to develop any new programs, raise any new funds,<sup>174</sup> or hire any additional faculty unilaterally for fear that the resulting disparity between

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173. At the risk of being too mathematical about a subject that does not lend itself to such precision, it should be noted that programs that comply with the Phillips paradigm under a microscopic approach would probably also comply under the macroscopic approach. The exception would be where differences between individual elements that are insubstantial when considered one at a time, consistently favor one program over the other so that, in the accumulation of such minor differences, a substantial overall difference between the programs develops.

174. In reciting the reasons why it thought that VWIL was not comparable to VMI, the Supreme Court noted the disparity between the large endowment for VMI (\$131 million) and the more modest endowment for Mary Baldwin College (\$19 million). See *VMI V*, 116 S. Ct. at 2285. It found that this disparity contributed to the lack of comparability between the two programs even though much of the VMI endowment was raised from private sources and held by a private group, the VMI Foundation. See *id.* at 2284-85.

the two schools could jeopardize its ability to continue as a single-sex institution. This is no way to run a school. The better approach is the macroscopic one.

#### VI. IS THE SAFE HARBOR A MIRAGE?

The possibility should be explored that the safe harbor of the Phillips paradigm is only a mirage, and that anyone seeking refuge there will flounder on the shoals of substantial comparability. Is substantial comparability a kind of Platonic form, having an existence in the abstract realm of ideas but never perfectly replicated in the real world? Or, to put it more simply, is “substantial comparability” inherently unachievable? This appears to be Justice Scalia’s fear. Although he did not address the Phillips paradigm directly, he came at the same question from the other direction by denigrating the majority’s implicit suggestion that any “unique” program would be subject to constitutional challenge: “I suggest that the single-sex program that will not be capable of being characterized as ‘unique’ is not only unique but nonexistent.”<sup>175</sup>

There is, of course, a sense in which Justice Scalia is undoubtedly correct. The practice of law wonderfully develops the ability to find distinctions where no differences exist, just as it develops the countervailing ability to make mountains and molehills seem like the same thing.<sup>176</sup> The issue is not whether all programs are *capable* of being characterized as unique, but whether they actually *will be* so characterized. Can it reasonably be said that the Supreme Court will characterize every single-sex program as unique, so that none will have the benefit of the Phillips paradigm? This is an entirely different question than the more abstract issue to which Justice Scalia alluded. It should not be answered without carefully counting votes.

Of the nine members of the Court, six joined in the majority opinion.<sup>177</sup> That opinion gives a significant degree of validity to—though admittedly not an express endorsement of—the Phillips paradigm.<sup>178</sup> It should not be presumed that these six Justices deliberately dropped misleading hints about the thinking among them and that none are serious about the use of that twice-cited paradigm as a meaningful standard of judgment. Take just two of those six Justices and add to them the dissenting Justice Scalia and Chief Justice Rehnquist, whose opinion clearly supports a substantial comparability standard,<sup>179</sup> and there are four Justices willing to give parallel single-sex programs a fair shake. Add to the four Justice Thomas, who took no part in the VMI case but whose philosophy of judicial restraint is well known,<sup>180</sup> and there is a new majority that may well look favorably upon any parallel single-sex programs that come before the Court.

175. *Id.* at 2306.

176. Both formations are, of course, quasi-conical projections from a horizontal plane and are thus the same category of topographical feature. Height is merely a matter of quantity, not quality, and is thus not a critical distinction. Or so the argument might go.

177. See *VMI V*, 116 S. Ct. at 2269.

178. See *VMI IV*, 44 F.3d at 1250.

179. See *VMI V*, 116 S. Ct. at 2290 (Rehnquist, C.J., concurring).

180. See, e.g., Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 63, 64, 69 (1989) (advocating “restraint and moderation” by the judiciary and criticizing “run-amok judges” and “arbitrary” courts).

Confidence in the safety of the Phillips paradigm is increased by three lower court cases decided in the 1970s. These cases include the 1970 decision of a three-judge panel in *Kirstein v. Rector & Visitors*,<sup>181</sup> requiring the coeducation of the undergraduate program at the University of Virginia in Charlottesville; the decision later that year by a three-judge panel in *Williams v. McNair*,<sup>182</sup> upholding the single-sex women's program at Winthrop College in South Carolina; and the 1976 decision by the Third Circuit in *Vorchheimer v. School District*,<sup>183</sup> upholding parallel single-sex high schools in the Philadelphia public school system.

*Kirstein* was a class action suit brought by four women who sought access to the College of Arts and Sciences in Charlottesville, Virginia.<sup>184</sup> At the time, the University of Virginia operated a separate undergraduate school for women at Mary Washington College in Fredericksburg.<sup>185</sup> Despite the attempt at parallel programs, the Court ruled in favor of the plaintiffs, holding that "Virginia may not now deny to women, on the basis of sex, educational opportunities at the Charlottesville campus that are not afforded in other institutions operated by the state."<sup>186</sup> The Court then went on to describe those opportunities uniquely available in Charlottesville in terms of two factors—curriculum and prestige<sup>187</sup>—later cited by Judge Phillips in his description of paradigmatic comparability.<sup>188</sup> The reason for ruling against the University's single-sex status was, in effect, its failure to comply with the Phillips paradigm.

*Williams* was a class action suit brought by a group of men who sought access to Winthrop College, a small, state supported, liberal arts women's college in South Carolina.<sup>189</sup> In ruling against the plaintiffs, the three-judge panel noted that South Carolina also operated one single-sex college for men, The Citadel, and went on to acknowledge the benefits of single-sex education.<sup>190</sup> The court also noted that there was no other unique benefit offered by Winthrop: "There is no suggestion that there is any special feature connected with Winthrop that will make it more

181. 309 F. Supp. 184 (E.D. Va. 1970).

182. 316 F. Supp. 134 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971).

183. 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided Court*, 430 U.S. 703 (1977).

184. *Kirstein*, 309 F. Supp. at 185.

185. *See id.* at 186. Two other state supported colleges, Radford University and Longwood College, were also for women only. *See id.* Mary Washington College is now a separate institution and all three now admit both sexes.

186. *Id.* at 187.

187. *See id.* "Unquestionably the facilities at Charlottesville do offer courses of instruction that are not available elsewhere. Furthermore, as we have noted, there exists at Charlottesville a 'prestige' factor that is not available at other Virginia educational institutions." *Id.*

188. *See VMI IV*, 44 F.3d at 1250.

189. *See Williams*, 316 F. Supp. at 135. Now Winthrop University, this institution has been coeducational since 1974. *See Winthrop University, Overview and History of Winthrop University* (visited Jan. 22, 1997) <<http://www.winthrop.edu/geninfo/histoverview.html>>.

190. *See Williams*, 316 F. Supp. at 137.

The idea of educating the sexes separately, the plaintiffs admit, "has a long history" and is practiced "extensively throughout the world." It is no doubt true, as plaintiffs suggest, that the trend in this country is away from the operation of separate institutions for the sexes, but there is still a substantial number of private and public institutions, which limit their enrollment to one sex and do so because they feel it offers better educational advantages.

*Id.* (footnote omitted).

advantageous educationally to [the plaintiffs] than any number of other State supported institutions. They point to no courses peculiar to Winthrop in which they wish to enroll.”<sup>191</sup>

The *Williams* court also took pains to distinguish the case from *Kirstein*, decided earlier that same year:

There the women-plaintiffs were seeking admission to the University of Virginia and it was conceded that the University occupied a preeminence among the State supported institutions of Virginia and offered a far wider range of curriculum. No such situation exists here. It is not intimated that Winthrop offers a wider range of subject matter or enjoys a position of outstanding prestige over the other State supported institutions in this State whose admission policies are co-educational.<sup>192</sup>

Thus, *Kirstein* and *Williams* represented two sides of the same coin in early challenges to state supported single-sex education. Where a state supported single-sex institution offered an underlying educational benefit that the other sex could not obtain elsewhere from the state, the lack of substantial comparability implicated equal protection concerns. Conversely, where the underlying educational benefits could be obtained elsewhere from the state, those equal protection concerns were not implicated. In short, when the prototype of the Phillips paradigm was not met, there was a constitutional violation. When the prototype of the paradigm was met, no constitutional violation was found.

*Vorchheimer* anticipated both *Hogan* and *VMI* in that it applied intermediate scrutiny, or what it termed a “substantial relationship” test,<sup>193</sup> to parallel single-sex high schools in Philadelphia. This test vindicated parallel public single-sex schools having academic and functional equivalency as described by the Phillips paradigm. In 1976, the Philadelphia public school system included two high schools classified as “academic” that accepted students from the entire city rather than particular neighborhoods.<sup>194</sup> Both schools had high admission standards and offered only college preparatory courses.<sup>195</sup> One school, Central High School, was all-male; the other, Girls High School, was all-female.<sup>196</sup> Philadelphia did not offer a coeducational academic high school.<sup>197</sup>

In summarizing the position of the parties, the Third Circuit said:

1. [T]he local school district has chosen to make available on a voluntary basis the time honored educational alternative of sexually-segregated high schools;

191. *Id.* at 138.

192. *Id.* at 138-39.

193. *Vorchheimer v. School Dist.*, 532 F.2d 880, 886 n.7 (3d Cir. 1976), *aff'd by an equally divided Court*, 430 U.S. 703 (1977). The Third Circuit drew this test from *Reed v. Reed*, 404 U.S. 71, 75 (1971), which it regarded as establishing “a test of ‘fair and substantial’ relationship which falls between the two more traditional norms” of strict scrutiny and rational relationship. *See id.*

194. *See Vorchheimer*, 532 F.2d at 881.

195. *See id.*

196. *See id.*

197. *See id.*

2. the schools for boys and girls are comparable<sup>198</sup> in quality, academic standing, and prestige;
3. the plaintiff prefers to go to the boys' school because of its academic reputation and her personal reaction to Central. She submitted no factual evidence that attendance at Girls High would constitute psychological or other injury; [and]
4. the deprivation asserted is that of the opportunity to attend a specific school, not that of an opportunity to obtain an education at a school with comparable academic facilities, faculty and prestige.<sup>199</sup>

Given these facts, the court of appeals found no violation of the Equal Protection Clause,<sup>200</sup> deciding that the same result would be reached under both the rational relationship test and the more onerous substantial relationship standard.<sup>201</sup> Even after *VMI*, the vindication of parallel single-sex programs in *Vorchheimer* remains good law in the Third Circuit, and highly persuasive elsewhere. In sum, it is highly unlikely that the safe harbor of the Phillips paradigm is only a mirage. In a legal world where there is no perfect safety anywhere, it is a good place to go and drop anchor.

#### VII. LEAVING THE SAFE HARBOR: AVOIDING SOME OF THE ROCKS

In order to seek safety in the Phillips paradigm, the public must be simultaneously operating two substantially comparable single-sex programs, one for males and one for females. The obvious next questions are whether and under what circumstances a community could constitutionally operate a single-sex program for one sex without a substantially comparable program for the other.<sup>202</sup>

Trying to discern whether, for the six-member majority, single-sex programs must exist in parallel in order to be lawful requires a return to the theme that *VMI* is unique.<sup>203</sup> There are two major components of this uniqueness. First, there is *VMI*'s adversative system, a system used at no other college in Virginia.<sup>204</sup> Second, there is the fact that, at the time of the litigation, *VMI* was the only public single-sex college remaining in the Commonwealth of Virginia.<sup>205</sup> Certainly, the unique-

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198. Notwithstanding this overall finding of comparability, the court elsewhere noted that Central's facilities were superior in the scientific field, a factor that may have contributed to the later split decision by the Supreme Court. *See id.* at 882.

199. *Id.* at 888.

200. *See id.*

201. *See id.* Given this analysis, the Court declined to decide which of the two tests were applicable. *See id.*

202. While this part of Judge Phillips' dissent was not mentioned in the majority opinion, it should be noted that even Judge Phillips did not say that compliance with the paradigm was either sufficient or necessary, only that it was "the arrangement most likely to survive scrutiny," thereby leaving open other possibilities. *VMI IV*, 44 F.3d at 1250.

203. In his concurrence, Chief Justice Rehnquist appeared to be of the view that to operate a single-sex program for one sex but not the other is "problematic," but that the state should be granted some latitude as it goes about to remedy this discrepancy. *See VMI V*, 116 S. Ct. at 2290.

204. *See supra* notes 130-35 and accompanying text.

205. *See supra* notes 134-35 and accompanying text.

ness of the adversative method was fatal to Virginia's case.<sup>206</sup> However, the Court never made clear how VMI's single-sex status would have affected the outcome if the adversative method were not an issue.

In critical passages of its opinion, where a clear path would be most expected, the majority wandered hopelessly back and forth. For example, in framing the two ultimate issues of the case, the Court began, in a reference to the adversative method, by focusing on VMI's "extraordinary opportunities for military training and civilian leadership development . . . ."<sup>207</sup> Then, in the next sentence, the Court switched over to talk about VMI's status "as Virginia's sole single-sex public institution of higher education."<sup>208</sup> Similarly, in footnote seven, limiting the scope of its decision, the Court ran the two ideas together in the same sentence: "We address specifically and only an educational opportunity recognized . . . as 'unique' . . . an opportunity available only at Virginia's *premier military institute*, the State's *sole single-sex public university or college*."<sup>209</sup> Writing such as this confused any intended instruction about the interplay between the two elements of VMI's uniqueness.

In addition to these passages, there is a lengthy portion of the Court's opinion in which it discussed VMI's single-sex status in relative isolation from its adversative system.<sup>210</sup> Unfortunately, this discussion is not entirely clear either. The Court began its discussion by accepting as "reality" the point emphasized by Virginia and undisputed by the DOJ that "[s]ingle-sex education affords pedagogical benefits to at least some students."<sup>211</sup> Under standard intermediate scrutiny analysis, the obvious next step for the Court would have been to assess whether these acknowledged benefits constituted an important governmental objective.<sup>212</sup> Instead of conducting such an analysis, however, the Court immediately shifted into a discussion about diversity, another objective put forward by Virginia as a reason to maintain VMI as an all-male institution.<sup>213</sup> The Court agreed with Virginia that "diversity

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206. This was shown by the fact that when Virginia created a single-sex, non-adversative leadership program for women at VWIL, the Court condemned the program as constitutionally inadequate, labeling it a "pale shadow of VMI." *VMI V*, 116 S. Ct. at 2285 (citation omitted).

207. *Id.* at 2274.

208. *Id.*

209. *Id.* at 2276 n.7 (citations omitted) (emphasis added).

210. *See id.* at 2276-79.

211. *Id.* at 2276.

212. "If VMI's single-sex status is substantially related to the government's important educational objectives . . . that concludes the inquiry." *Id.* at 2302 (Scalia, J., dissenting). If the benefits of single-sex education were the important government objective then the continuation of single-sex status is substantially related to achieving those objectives. The Court mistakenly condemned such reasoning as "circular." *See id.* at 2281. As logicians know, a circular argument is one in which each of two or more conclusions depend for its validity upon the validity of the other conclusions. The argument here is not circular because the first premise is not derived from the second, but is based on an observation of educational reality. The argument is, instead, tautologous (which is not a logical flaw) in that the second premise is derived by definition from the first. To belabor the obvious, excluding one sex from a single-sex program must be substantially related to obtaining the benefits of a single-sex program because without such exclusion, the program is no longer single-sex and its benefits are lost.

213. Although Virginia argued that offering single-sex educational opportunities promoted diversity, it did not contend that diversity in the educational landscape was the only benefit to be obtained. On the contrary, Virginia maintained, "Single-sex educational programs provide a materially more effective learning environment for significant numbers of students *and* complement the diver-

among public educational institutions can serve the public good,"<sup>214</sup> then excoriated the Commonwealth, charging that diversity was not Virginia's "actual purpose" for keeping VMI as an all-male institution.<sup>215</sup> The fact that giving men the benefits of a single-sex education was Virginia's obvious purpose for operating a single-sex VMI was never addressed,<sup>216</sup> nor did the Court ever return to the question of whether such benefits were an important governmental objective.<sup>217</sup> Instead, the Court concluded by announcing that it found "no persuasive evidence in this record that VMI's male-only admission policy is in furtherance of a state policy of diversity."<sup>218</sup> The Court declared that "[h]owever 'liberally' this plan serves the State's sons, it makes no provision whatever for her daughters. That is not *equal* protection."<sup>219</sup>

It is a nice concluding flourish, but the discussion is truly a muddle. The Court began by pretending that it was going to analyze one question: *Is Virginia justified in maintaining a single-sex admission policy at VMI?*<sup>220</sup> It ends several pages later by pretending that it had just analyzed another question: *Is Virginia justified in maintaining a single-sex institution of higher education for men, but none for women?*<sup>221</sup> In between, it actually discussed an entirely different issue: *Is Virginia's stated goal of diversity genuine?*<sup>222</sup> Like a stage magician who uses distraction to cover his sleight of hand, the Court beguiled its audience by collapsing the first question into the second and by answering the second without having analyzed either, obfuscating the entire maneuver by an often irrelevant and largely inaccurate diatribe on Virginia history.<sup>223</sup>

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sity and educational benefits offered by a State's primarily coeducational system of higher education." Brief for Cross-Petitioners, *supra* note 73, at 26.

214. *VMI V*, 116 S. Ct. at 2277.

215. *See id.* For a vindication of Virginia's genuine interest in diversity, see *id.* at 2298-300, 2303-04.

216. *See id.* at 2304.

217. Of course, if the benefits of single-sex education were not an "important governmental objective," then the Court could have so declared it and thereby reduced this portion of its opinion from many tortuous paragraphs to just a few straightforward sentences.

218. *VMI V*, 116 S. Ct. at 2279 (citations omitted).

219. *Id.*

220. *See id.* at 2276.

221. *See id.* at 2279.

222. *See id.* at 2276-79.

223. The Court completely ignored the efforts undertaken by Virginia to assure young women the benefits of single-sex education, even in the face of diminished demand for such colleges, by assisting four private all-female colleges: Hollins College, Sweet Briar College, Randolph-Macon Women's College, and Mary Baldwin College. As Justice Scalia reminded the majority, these efforts include "tuition assistance, scholarship grants, guaranteed loans, and work-study funds for residents of Virginia, who attend private colleges in the Commonwealth," as well as "other financial support and assistance to private institutions—including single-sex colleges—through low-cost building loans, state-funded services contracts, and other programs." *VMI V*, 116 S. Ct. at 2299 n.3.

Notwithstanding Justice Scalia's protest, the majority even went so far as to act as though a key document, the *1990 Report of the Virginia Commission on the University of the 21st Century*, was implicitly critical of single-sex education when, in fact, the opposite was true, the report having expressly included "single-sex education" as one of the options in Virginia's "great array of institutions." *See* Brief for Cross-Petitioners, *supra* note 73, at 7. *Compare VMI V*, 116 S. Ct. at 2272, 2278 (majority opinion) *with VMI V*, 116 S. Ct. at 2299 (Scalia, J., dissenting opinion).



This judicial prestidigitation is especially disappointing—and undeserved—because the distinction between the first and second questions was articulated at the earliest stage of the litigation when, in deciding for VMI on the liability issue, the district court wrote:

[I]t seems to me that the criticism which might be directed toward Virginia's higher educational policy is not that it maintains VMI as an all-male institution, but rather that it fails to maintain at least one all-female institution. But this issue is not before the Court . . . [W]hether Virginia can continue to rely upon private colleges to supply single-gender education to females or whether it must operate a state supported, all-female college is not an issue to be resolved in this lawsuit.<sup>224</sup>

Notwithstanding the disappointing approach taken by the Supreme Court, the probable message can still be deciphered: the Court will not approve a single-sex program for one sex in the absence of a comparable program for the other sex, unless the difference in treatment can survive intermediate scrutiny. As an abstract proposition,<sup>225</sup> this is not an unreasonable result.<sup>226</sup> If the benefits of single-sex education are so significant that they constitute an important governmental objective so as to justify excluding certain citizens from a school or classroom based on their sex, then arguably those benefits are also so important, ipso facto, that they cannot be granted to one sex while denied to the other unless that difference of treatment also satisfies an important governmental objective. Seen in this light, public school systems that wish to offer all-male academies or all-female math and science programs are well-advised to provide counterpart programs for the other sex as well.

224. *VMI I*, 766 F. Supp. at 1414-15.

225. As a governmental proposition, however, laws—and especially constitutions—should not be abstract, but should be rooted in the tradition, history, and intent of the people who wrote them. When the simple words of a constitutional principle are abstracted, that is to say, drawn away from their proper context, they become more or less empty vessels which those who sit as judges may then fill with the distillations of their own, personal, ideological fermentations. Whatever may be the merits of such an aristocracy of the robe, it is not self-government. As Justice Scalia wrote:

[W]hen a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, wide-spread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. The same applies, *mutatis mutandis*, to a practice asserted to be in violation of the post-Civil War Fourteenth Amendment.

*VMI V*, 116 S. Ct. at 2292-93 (internal quotation marks and citations omitted).

226. In the context of *VMI*, even the abstract reasonableness of such a result vanishes beneath those highly inconvenient facts the Court simply chose to ignore. First, as the district court noted, the lawsuit was not brought and the case was not tried based on any failure to provide parallel programs. See *VMI I*, 766 F. Supp. at 1414-15. That issue was made part of this case by the Fourth Circuit. See *VMI II*, 976 F.2d at 898. Second, even before the establishment of VWIL, Virginia provided single-sex education for its young women through a deliberate—and expensive—collaboration with its private women's colleges. See *supra* note 223. Third, the fact that Virginia's public colleges included a single-sex institution for men, but none for women, was not the product of any statewide policy that such a result be produced, but was the result of the autonomy given to Virginia's individual institutions and the decisions autonomously made by them in the educational marketplace, especially the decisions by the previously all-female public colleges to admit men. See Brief for Cross-Petitioners, *supra* note 73, at 29. The purpose of such autonomy is to encourage the very diversity that the Court dismissed as pretextual, ignoring Justice Scalia's insight: "[W]here the goal is diversity in a free market for services, that tends to be achieved even by autonomous actors who act out of entirely selfish interests and make no effort to cooperate." *VMI V*, 116 S. Ct. at 2300.

VIII. A COMPARABILITY CONUNDRUM: *BRAY V. LEE*

The difficulty of applying the Phillips paradigm in the real world is illustrated by the 1972 case of *Bray v. Lee*,<sup>227</sup> cited by the Supreme Court in its *VMI* decision.<sup>228</sup> The *Bray* case involved the all-male Boston Latin School and its female counterpart, the Girls Latin School, both part of the public school system of Boston, Massachusetts.<sup>229</sup> Together, the schools gave each sex the benefit of a single-sex setting. Admission to the schools was based upon an examination.<sup>230</sup> Boys who scored "120 or better out of a possible 200 points" were admitted,<sup>231</sup> but girls were not admitted unless they scored at least 133.<sup>232</sup> A class action was brought on behalf of girls denied admission but scoring in the 120 to 133 range.<sup>233</sup> The Court concluded that "the use of separate and different standards to evaluate the examination results to determine the admissibility of boys and girls to the Boston Latin schools constitutes a violation of the Equal Protection Clause . . . ."<sup>234</sup>

On the surface this result seems unremarkable, but upon closer analysis it becomes quite problematic whether any such rule can be applied generally to parallel single-sex educational opportunities. In *Bray*, the difference in admission standards was the result of the different number of seats allocated to the two programs.<sup>235</sup> The Boys Latin building had a seating capacity for approximately 3000 students, while the Girls Latin building had a seating capacity for only 1500 students.<sup>236</sup> In determining the cut-off mark for admission, school administrators determined the number of seats available for boys and then "counted down from the top possible score of 200 until they had accepted a number of boys equal to the number of available seats."<sup>237</sup> The same process was followed for the girls, but with fewer available seats.<sup>238</sup> The court required the school to compute what the cut-off mark would have been if it had used the same cut-off mark for both boys and girls as determined by the total number of available seats.<sup>239</sup> This resulted in a new cut-off mark of 127 and the court required that all girls scoring 127 or better be admitted.<sup>240</sup> The court did not expressly order that the schools be combined or become coeducational, though that might have been the practical consequence of the ruling even in the absence of supervening legislation.<sup>241</sup>

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227. 337 F. Supp. 934 (D. Mass. 1972).

228. See *VMI V*, 116 S. Ct. at 2282 n.17.

229. See *Bray*, 337 F. Supp. at 935.

230. See *id.*

231. See *id.*

232. See *id.*

233. See *id.*

234. *Id.* at 937.

235. See *id.* at 936.

236. See *id.*

237. *Id.*

238. See *id.*

239. See *id.*

240. See *id.*

241. In August of 1971, just a few months before the court's ruling in February of 1972, Massachusetts adopted legislation prohibiting single-sex public education in that state. See MASS. ANN. LAWS ch. 76, § 5 (Law. Co-op. 1996). The adoption of this legislation apparently did not render the case moot because, inter alia, it would not necessarily have resulted in admission for the same

The disparity in cut-off marks used for the boys and girls was the outgrowth of the underlying gross disparity between the number of seats available for the members of each sex,<sup>242</sup> a disparity which would disqualify the Boston Latin Schools from any safety offered by the Phillips paradigm.<sup>243</sup> But even if the number of seats had been the same, it would not necessarily mean that both programs would have had the same cut-off marks under the methodology used by the school. In order to be certain that an equal number of seats will lead to an equal cut-off mark, at least two other factors must be equal. First, there must be an equal demand among boys and girls for admission to the schools. In other words, there must be as many girls who take the test as boys. Second, the distribution of scores must be the same among the boys as it is among the girls. To assume that these factors would be equal is to assume a degree of mathematical symmetry between the sexes that rarely exists in the real world. Demand for single-sex education appears to be greater nationwide among females than among males.<sup>244</sup> On the other hand, late adolescent males appear to score higher nationwide in standardized testing than late adolescent females.<sup>245</sup> These nationwide disparities between the sexes do not preclude the possibility that, in particular communities, various cultural and other sociological factors may be present that eliminate—or even reverse—these statistical differences.

The point here is not to craft a meaningful rule of universal application, but to illustrate the difficulty of creating any such rule, including a rule that requires the same test scores be used for admission for both sexes whenever there is a system of parallel programs. In *Bray*, even if both programs had the same number of available seats, differences between the sexes in terms of demand and distribution of test scores may very well have generated different cut-off marks.<sup>246</sup> So where is equality of opportunity—or substantial comparability—to be found? If the law re-

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ninth graders who were the beneficiaries of the Court's decision. See *Bray v. Lee*, 337 F. Supp. 934, 937 (D. Mass. 1972).

242. The court expressly attributed the girls cut-off score to the "lesser number of seats available." *Bray*, 337 F. Supp. at 936. Whether the same number of seats would have produced the same cut-off mark cannot be gleaned from the facts contained in the decision.

243. The reported decision contains no explanation for why there was such a disparity in available resources, and no meaningful conclusions can be drawn from the case as to what the rationale might have been, if there was one.

244. Excluding post-secondary institutions, the Department of Education (DOE) has reported 639 girls schools (52.2%) compared to 585 boys schools (47.8%). See SINGLE-SEX SCHOOLING, *supra* note 122, at 31 (citing NAT'L CENTER FOR EDUC. STAT., SCHOOLS AND STAFFING SURVEY (1987-88)). At the college level, in 1991, there were 64,000 students attending approximately 56 women's colleges and 11,400 students attending 11 men's colleges (including VMI and The Citadel). See *VMI I*, 766 F. Supp. at 1420.

245. Over the 25 year period 1972 through 1996, the mean SAT score for college bound senior men consistently exceeded the mean score for college bound senior women in both the math and verbal categories. See Dennis Kelly, *SAT Adjustment Worth 100 Points*, USA TODAY (Arlington, Va.), Aug. 23, 1996, at D1. The average mean score in verbal was 511 for men and 503 for women; the average mean score in math was 521 for men and 481 for women (based on 1996 "recentering" of scores). *Id.*

246. The reported decision does not contain sufficient factual detail to make a reliable computation, but, given disparities observed elsewhere, one may take as a general proposition that demand and test results are likely to have been different. Such disparities might well have augmented the lopsidedness of the two-to-one allocation of seats in favor of the boys, a fact that would have support the result reached in *Bray*.

quires comparability of resources (e.g., available seats), or even comparability of resources as adjusted by numerical demand, then the law must leave room for disparities in test scores or other admission standards. Conversely, if the law requires comparability of admission standards, the law must leave room for differences in resources.<sup>247</sup>

As originally presented by Judge Phillips, his paradigm spoke of comparability of resources, not comparability of admission scores.<sup>248</sup> The Supreme Court, however, implicitly amended the list of critical factors by treating admission standards (in the form of SAT scores) as a point of comparison.<sup>249</sup> It did so, however, in a manner directly contrary to the way in which the decision in *Bray* used test scores. In *Bray*, the district court treated higher admission standards for females as a mark of discrimination against them on the grounds it made it harder for them to be admitted.<sup>250</sup> In *VMI*, the Supreme Court treated the lower SAT scores at Mary Baldwin College as a mark of discrimination against the women at VWIL, apparently on the grounds that the quality of the student body was not as high and thus the educational opportunity would not be as good.<sup>251</sup> Together, the two approaches create a conundrum. The sex that is favored by lower admission scores cannot also be disfavored by those same lower scores.

The two cases can be reconciled, however, if one treats as the dispositive factor in *Bray* the dramatic underlying discrepancy in resources rather than the difference in admission scores caused by that discrepancy in resources. An additional measure of comfort is obtained if, in *VMI*, one treats the perceived difference in student body quality not as a factor fatal by itself, but simply as one factor contributing to the overall lack of comparability found by the Court; that is to say, if one follows a macroscopic rather than microscopic approach.

#### IX. CAN A SINGLE-SEX PROGRAM FOR ONE SEX WITHOUT A PARALLEL PROGRAM FOR THE OTHER SURVIVE INTERMEDIATE SCRUTINY?

To say that providing a single-sex program to only one sex must be tested by intermediate scrutiny is not to say that such an undertaking is doomed to failure. Unlike the familiar maxim about strict scrutiny, intermediate scrutiny is not necessarily fatal in fact.<sup>252</sup> Moreover, as argued by the Commonwealth of Virginia and acknowledged by Justice Scalia: "[I]f a program restricted to one sex is necessarily unconstitutional unless there is a parallel program restricted to the other sex, the

247. Presumably, the Constitution of the United States would not require that available seats for one sex or the other go wastefully unused so as to hold both resources and test scores in an artificial balance.

248. See *supra* note 164 and accompanying text.

249. See discussion *supra* note 169.

250. See *Bray v. Lee*, 337 F. Supp. 934, 937 (D. Mass. 1972).

251. See *VMI V*, 116 S. Ct. at 2284 ("Mary Baldwin College, whose degree VWIL students will gain, enrolls first-year women with an average combined SAT score about 100 points lower than the average score for VMI freshmen.").

252. For the origin of the now familiar maxim "'strict' in theory and fatal in fact," see Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). The Court in *VMI* pointed out its recent observation that strict scrutiny may not always be fatal. See *VMI V*, 116 S. Ct. at 2275 n.6 (citing *Adarand Constructors, Inc. v. Peña*, 115 U.S. 2097, 2117 (1995)).

opinion in *Hogan* could have ended with its first footnote, which observed that Mississippi maintains no other single-sex public university or college.<sup>253</sup> A similar observation must be made about the *VMI* decision. If a public single-sex educational program is always unconstitutional when there is no counterpart for the other sex, then the liability portion of the Court's decision could have been reduced to a single sentence, leaving the rest of the decision to deal with the proposed remedy of VWIL.

Depending upon the facts of a particular case, there may be a constitutionally adequate explanation for an apparently one-sided arrangement. Presumably, any public school board that provided a single-sex program for one sex but not the other would argue that the benefited sex has greater demand or a greater need for such a program. In addition, the school board would undoubtedly argue that the need to allocate scarce public resources to the areas of greatest demand or need justifies any lack of even-handedness.

Should such an argument prevail? Consider the following scenario: In a typical high school in the United States, a group of senior girls and their parents have decided they want the school to offer an all-female calculus class. They have read about the benefits of all-female math classes, and they are personally familiar with the distractions and pressures that make learning this often difficult subject even more difficult in a coeducational setting. The students and parents approach the principal and ask her to explore the possibility of offering calculus in a single-sex setting. The principal, being an open-minded individual (or a traditionalist, take your pick), believes that teaching boys and girls separately could be a good idea. So, as a first step, she sends a questionnaire to all the seniors in her high school, boys and girls, asking about their interest in a single-sex calculus class. Twenty-five of the girls say they want such a class, more than enough to organize one. In contrast, while many of the boys want calculus, only two express any interest in a single-sex environment, not nearly enough to justify allocation of a teacher or classroom space.<sup>254</sup> What is the principal to do?

She has two choices. She could accommodate the demand of the twenty-five girls by offering an all-female calculus class, while telling the two boys that, if they want calculus, it will have to be in a coeducational classroom. Or, she could tell the girls that, because not enough boys want it, neither sex may have a single-sex calculus class and both are stuck with the coeducational setting. This second option, while it might be chosen out of fear of litigation, sounds less like the principle of equal protection and more like the fable of the Dog in the Manger.<sup>255</sup>

In the remedial phase of the *VMI* case, Virginia made such a Dog in the Manger argument as part of its defense of the all-female, non-adversative leadership program it created at VWIL. The argument ran like this:

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253. *VMI V*, 116 S. Ct. at 2303 (internal quotation marks and citations omitted).

254. For purposes of simplicity, this hypothetical assumes that there is not a sufficient number of boys wanting any subject in a single-sex setting. If a large group of boys wanted, say, a boys' literature course as their counterpart to the girls' calculus class, the ability of the school to get by with offering one single-sex class, but not the other, would be more problematic.

255. See *The Dog in the Manger*, NEW TALES FROM AESOP 86 (Paul Roche ed., 1982) (dog, not wanting to eat hay, nevertheless denies it to hungry horse).

1. To work, the adversative method requires both a single-sex setting and a sizable cohort of cadets.

2. The demand among women for a single-sex adversative program is too small to achieve the necessary cohort.

3. Therefore, a mirror image of VMI for women is not feasible and Virginia is justified in establishing a different sort of single-sex leadership program for women.

4. Moreover, to require the coeducation of VMI—and thus cause the abandonment of the adversative method—is tantamount to saying that, because the women do not want it, the men cannot have it. The Constitution requires no such extreme result.

This argument worked to a point. It helped Virginia win approval of its VWIL program from both the district court and the court of appeals. The argument worked there because both of these courts agreed with the first two premises of the argument. Both courts believed that the adversative method requires a single-sex setting,<sup>256</sup> and both recognized that the demand among women for a mirror image VMI is too small for such a program to work.<sup>257</sup> The argument faltered in the Supreme Court because the majority rejected the premise that the adversative system requires a single-sex setting.<sup>258</sup> With the syllogism thus broken, there was no need to consider the second premise, the inadequacy of demand for a mirror-image VMI.

To return to the analogy of the all-female calculus class in high school, the Supreme Court treated the exclusion of women from the only available adversative system as one would expect it to treat the exclusion of boys from the only available calculus class. It would not do to offer calculus only in an all-female class, and to tell the boys that they cannot take the course because doing so would deprive the girls of the benefits of a single-sex setting. Likewise, the Supreme Court would not allow young women to be excluded from VMI's unique adversative system, even though their admission to VMI would eliminate the benefits of its single-sex setting. In the eyes of the Court, the benefits of single-sex education, however justified pedagogically, apparently do not justify excluding one sex from an underlying educational program, where that program—be it calculus or the ad-

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256. See *VMI IV*, 44 F.3d at 1233.

257. In *Faulkner*, the Fourth Circuit took the opportunity to explain the meaning of its decision in *VMI II* with respect to what a parallel plan would require, stating that "any analysis of the nature of a separate facility . . . must take into account . . . the demand (both in terms of quality and quantity)." *Faulkner v. Jones*, 10 F.3d 226, 232.(4th Cir. 1993).

Noting this comment by the Fourth Circuit, the district court relied on evidence that "there would be little demand for a female VMI," *VMI III*, 852 F. Supp. at 476, 480 (citing testimony of Dr. Elizabeth Anne Fox-Genovese), and that "the demand for an all-women's VMI would be so small as to make the project unfeasible," *id.* at 481 n.12 (citing testimony of Dr. Richard C. Richardson). The Fourth Circuit followed a similar route, noting that:

Educational experts for the Commonwealth testified that . . . if the state were to establish a women's VMI-type program, the program would attract an insufficient number of participants to make the program work. The United States did not offer sufficient evidence to lead us to conclude that the Commonwealth's expert testimony was clearly erroneous in this regard.

*VMI IV*, 44 F.3d at 1241.

258. See *VMI V*, 116 S. Ct. at 2280.

versative method<sup>259</sup>—is not otherwise available to the excluded sex and can be feasibly offered in a coeducational setting.<sup>260</sup>

On the other hand, if the state or the school wants to offer adversative training or calculus in a single-sex setting, it would stand to reason that it could do so if it offered a substantially comparable program to both sexes. If there were not enough demand for two, parallel, single-sex programs, then the sex that does want the single-sex program may still be able to have it, but only if the underlying educational program is made available to the other sex in a regular, coeducational environment.<sup>261</sup>

To allow one single-sex program, based on lack of demand from the other sex, would be the common sense result, but such a result still must fit into the requirements of intermediate scrutiny. There are at least two arguments that might be made on this score, one dealing with diversity, the other with special needs. The first argument begins with the proposition that diversity in educational opportunity is an important governmental objective, a point that has long been recognized by the Supreme Court. In a 1973 case, *San Antonio Independent School District v. Rodriguez*, the Court said: “No area of social concern stands to profit more from a multiplicity of view points, and from a diversity of approaches than does public education.”<sup>262</sup> Even in *VMI*, the Court said, “it is not disputed that diversity among public educational institutions can serve the public good.”<sup>263</sup> Thus, the Court continued to salute diversity as an important governmental objective, even as it used its own peculiar reading of Virginia history to impugn the genuineness of Virginia’s desire to pursue it.<sup>264</sup>

If a community can succeed where Virginia failed—and can persuade the courts that its interest in diversity is genuine<sup>265</sup>—then it must go on to show that

259. It is not entirely clear from the majority’s opinion whether the adversative method, standing alone, was enough to qualify as the unique benefit that could only be obtained at VMI and thus had to be made available there to both sexes. An alternative reading of the decision is that the adversative method was only one element in a broad mixture of elements that in combination distinguished VMI to the point that women could not be excluded. In comparing VMI to VWIL, the Court addressed a number of factors other than the adversative method, including prestige of the VMI degree, access to the VMI alumni network, the perceived difference in quality of student body and faculty, the academic offerings available, and the difference in endowment. See *VMI V*, 116 S. Ct. at 2284-86. Of course, unless and until some other single-sex school attempts to adopt the adversative method, or perhaps to implement some other drastically different teaching methodology not available elsewhere to the other sex, the issue may be entirely academic.

260. Given the Court’s brusque dismissal of the lower courts’ findings that the adversative method requires a single-sex setting, it is hard to conceive of any educational program that the Court would accept as being incompatible with coeducation. See *VMI V*, 116 S. Ct. at 1280.

261. If the adversative method had been offered to women elsewhere in Virginia—for example, at Virginia Tech’s coeducational military program—then perhaps the *VMI* case would have turned out differently. As a practical matter, however, there would be great difficulties in administering the adversative method at Virginia Tech, where the cadets form a part of—and intermingle with—a larger civilian student body. See generally *VMI V*, 116 S. Ct. at 2269-70 (describing the living arrangements and traditions of VMI cadets).

262. 411 U.S. 1, 50 n.106 (1973).

263. *VMI V*, 116 S. Ct. at 2277.

264. See *id.* at 2277.

265. The district court accepted as a factual matter the genuineness of Virginia’s interest in diversity, a finding the Fourth Circuit did not overturn. See *VMI I*, 766 F. Supp. at 1419-20. It was only when the case reached the Supreme Court—the only court that ultimately mattered—that Virginia’s

there is a substantial relationship between that objective and its lack of even-handedness in offering single-sex programs. Meeting the second part of the test may be related to the first. Where the community can show a dramatic disparity in demand between the two sexes, coupled with a limitation on its resources, it may be able to convince the courts that offering two parallel programs is simply not a viable option. In such a case, it can be argued that the apparent lack of even-handedness is substantially related to providing the single-sex opportunity to the sex that most wants it, and thereby promotes diversity. In other words, if the real-world choice is to provide a single-sex program to one sex or to provide it to none, then diversity is furthered by providing it to one. Moreover, where the record shows that school officials carefully and objectively measured both demand and available resources before reaching their decision, it should help persuade the courts that diversity is truly their motivation. Conversely, where the gap in demand is less pronounced, or where resources are less constrained, the relationship between the lack of even-handedness and the attainment of diversity is more attenuated and may prove unpersuasive. In such a situation, the courts are also likely to scrutinize more closely the motives of the school officials.<sup>266</sup>

The second argument for why one single-sex program should be permitted, based on a lack of demand from the other sex, deals with the special needs of the benefited sex. Thus far, the discussion about demand has taken into account only the quantity of demand, not the degree of need or what might be called the quality of demand.<sup>267</sup> This is not, however, how educators think. While demand often serves as a proxy for need, particularly under a free market approach, the proxy relationship does not always hold true when the good demanded is more or less freely available to the consumer, as is generally the case with public school services. Thus, even if both sexes were to indicate equal numerical demand for a single-sex program, it is possible that the needs of one sex would be greater and that school officials could use those special needs to justify a lack of parallel programs.

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commitment to diversity was found wanting. See *VMI V*, 116 S. Ct. at 2275-78.

266. For example, if based on a dramatic difference in demand, the per pupil cost of an all-female calculus class is only 10% the per pupil cost of a calculus class for boys, school officials may have a persuasive case for offering a single-sex program for the girls, but not for the boys. On the other hand, if the difference in demand is small, so that per pupil cost for the girls is 95% the cost for the boys, the court may find the difference to be not so substantial as to justify the failure to treat both sexes the same. This approach is supported by the post-*VMI V* decision in *Women Prisoners v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996). There a group of women prisoners alleged that they were denied equal protection because they were not afforded the same programs as male prisoners. See *id.* at 911. The court rejected their claim, holding that the male and female prisoners were not similarly situated because the men's prison had a much larger population (936 inmates) than the women's prison (107 inmates). See *id.* at 924. Citing the decision in *VMI V*, the court also distinguished the financial discrepancy between Mary Baldwin College and VMI from the case before it, noting that the women prisoners failed to show that prison officials allocate fewer resources per female inmate than they allocate per male inmate. See *id.* at 926. But see *Plyler v. Doe*, 457 U.S. 202, 227 (1982) (citing *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971): "[C]oncern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources."); see also *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (stating that the State "may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a state may not accomplish such a purpose by invidious distinctions . . .").

267. The Fourth Circuit District court said that school officials may justify differences in treatment based both on quantity and quality of demand. See *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993).



Under such an approach, meeting those special needs would replace or re-enforce diversity as the important government objective.

The *VMI* case did not involve any claim that college men need the benefits of single-sex education more than college women.<sup>268</sup> Thus, the question of whether the special needs of one sex can qualify as an important government objective was not squarely addressed by the Court. The Court did, however, give an unmistakable nod in the direction of this possibility: “‘Both men and women can benefit from a single-sex education,’ the District Court recognized, although ‘the beneficial effects’ of such education, the court added, apparently ‘are stronger among women than among men.’ The United States does not challenge that recognition.”<sup>269</sup>

It is precisely the view that high school girls benefit from single-sex education more than boys, at least in certain subjects, that has led to experimentation with all-female math and science classes.<sup>270</sup> The idea that girls may benefit more than boys from such programs is not based on any immutable principle but upon observations in the real world.<sup>271</sup> Thus, the validity of the idea is limited to the circumstances where the observations were made and does not necessarily hold true elsewhere. Indeed, in the inner-cities, many educators believe that widespread fatherlessness and other social pathologies create special needs among the young males who live there, needs that have no equivalent among the young females.<sup>272</sup> Addressing those needs should qualify as an important governmental objective. Moreover, there is a substantial relationship between that objective and a decision by local school authorities to prioritize their resources and make single-sex education available to males without simultaneously creating single-sex opportunities for females. As one of *VMI*’s amici argued:

A city’s prioritizing decisions are not invidious gender classifications, but rather *realistic* reflections of the fact that males and females are not fungible. Just as a legislature may provide for the special problems of women, a city should be able to respond to the very real needs of urban males, provided that it has done so in a reasoned way, without relying on archaic and stereotypic notions, or in a way which demean[s] the ability or social status of the affected class.<sup>273</sup>

Where school officials can show that one sex of their students—whether girls or boys—has special needs for single-sex education, they have a sound argument

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268. *VMI* did make a different sort of claim, arguing that men in general can benefit more from the adversative system than women in general. The Supreme Court did not reject this claim so much as treated it as irrelevant since there are “some women” who could benefit from the adversative system. See *VMI V*, 116 S. Ct. at 2284.

269. *Id.* at 2277 n.8. (citation omitted).

270. See *supra* notes 113-23 and accompanying text, discussing all-female math and science classes. Whether high school boys may be found to profit similarly from single-sex classes in subjects such as art or literature is apparently an open question.

271. For example, the all-female math classes in Ventura were implemented after studies showed that “girls’ grades and interests in math begin to fall off markedly during junior high.” See *Women’s Schools Together Brief*, *supra* note 99, at 22.

272. See *supra* notes 102-12 and accompanying text, discussing all-male inner-city academies.

273. *Women’s Schools Together Brief*, *supra* note 99, at 19, 20 (internal quotation marks and citations omitted).

for preserving their program against constitutional challenge, even in the absence of a parallel program for the other sex.<sup>274</sup>

This does not guarantee that they will win. Given the Supreme Court's treatment of the record in *VMI*,<sup>275</sup> the greater challenge may not be fitting the idea of special needs into the framework of intermediate scrutiny, but persuading the Court that any generalizations about the sexes—even those supported by unrebutted expert testimony—should be treated seriously and not dismissed as stereotypical. In light of the above quoted footnote about the beneficial effects being stronger for one sex than another,<sup>276</sup> there is reason for optimism that the Court may still be open on the issue of special needs. Any such optimism, however, must be tempered by the realization that the result of any future case ultimately may turn on whether the Supreme Court agrees with the policy choices reflected in the single-sex program at issue.<sup>277</sup> While reduction of constitutional issues to judicial policy preferences is certainly no cause for celebration, it is a process under which innovative programs benefiting women and minorities may well fare better than a traditional Southern military college, even one as distinguished as VMI.

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274. School officials may also have to contend with brought under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 (1994) and the Equal Educational Opportunity Act, 20 U.S.C. §§ 1701-58 (1994). However, these suits would not necessarily be fatal. *See, e.g., Vorchheimer v. School Dist.*, 532 F.2d 880, 885 (3d Cir. 1976), *aff'd by an equally divided Court*, 430 U.S. 703 (1977) (holding that the Equal Educational Opportunity Act "reveals no indication of Congressional intent to order that every school in the land be coeducational and that educators be denied alternatives.").

275. *See supra* note 141.

276. *See supra* note 269 and accompanying text.

277. *See VMI V*, 116 S. Ct. at 2291-92, 2301 (arguing that the Court rejected factual findings, precedent, and history in order to reach a holding that "favor[s] . . . the Justices' own view of the world.") (Scalia, J., dissenting).